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REPORTS OF CASES *aug. 3*

DECIDED IN

THE SUPREME COURT

OF THE

STATE OF OREGON.

ROBERT G. MORROW,

REPORTER.

VOLUME XXX.

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1898.

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See Feb. 24, 1898.

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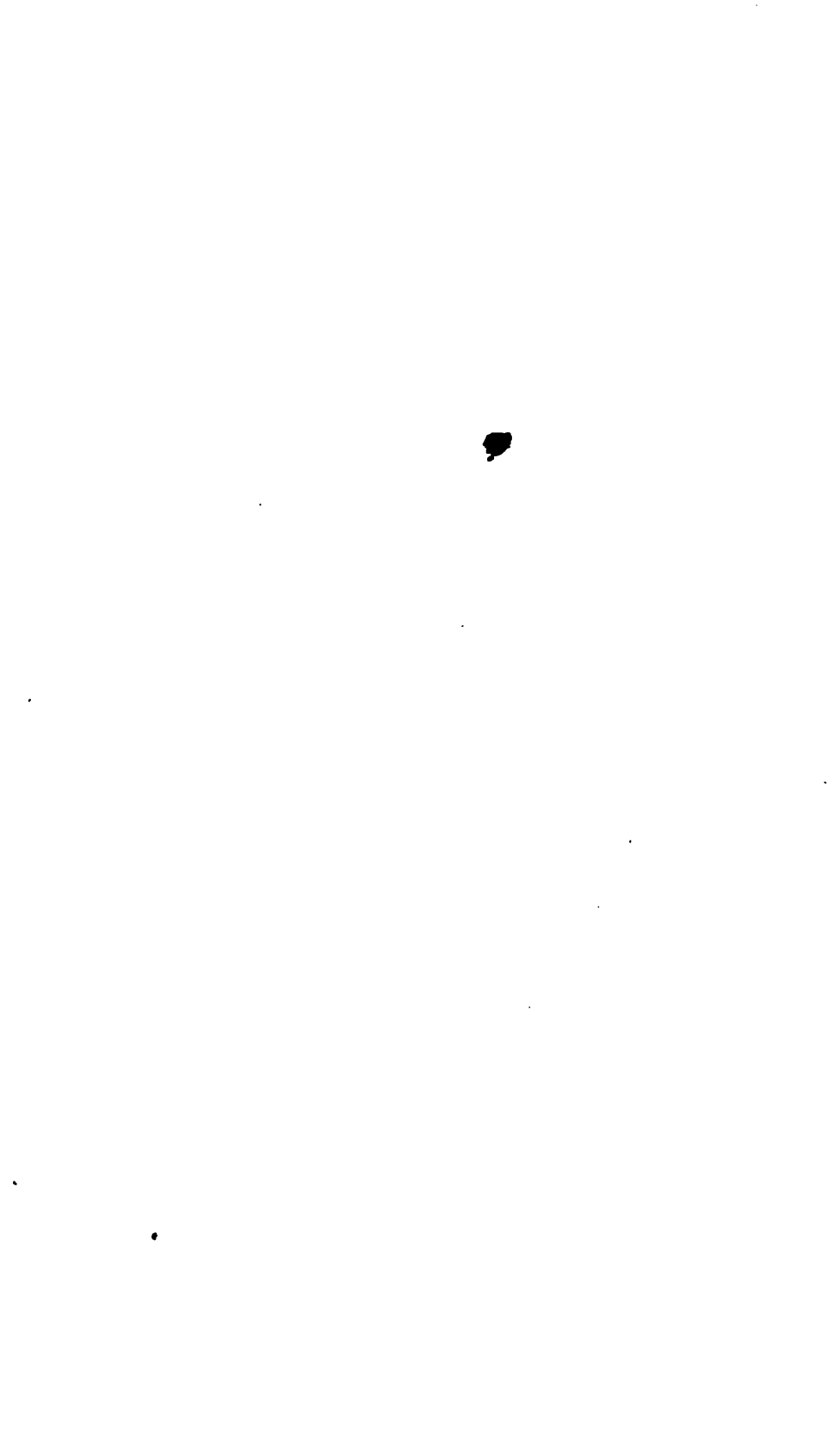


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CASES DECIDED
IN THE
SUPREME COURT
OF
OREGON.

Argued March 17; decided September 21, 1896.

FISHER v. KELLY.

(46 Pac. 146.)

1. **ATTACHMENT CREDITOR—PRIVITY OF TITLE—RIGHT TO ATTACK FRAUDULENT CONVEYANCE.**—Before an officer who is holding attached property that is claimed by a stranger can justify his possession on the ground that he is the agent of the attaching creditors, he must show not only his writ but also that the plaintiffs in the writ were actual creditors of the defendant; and, having thus brought his principals in privity with the attached property, he may attack the stranger's title.
2. **RIGHT OF OFFICER TO QUESTION A STRANGER'S TITLE TO PROPERTY HELD ON EXECUTION.**—Where an officer holds under an execution property taken from a stranger, the writ, when supported by the judgment on which it is issued, is a sufficient lien or title to enable him to question the sufficiency of the stranger's title, and he need not show, as in the case of such property held on attachment, the existence of a debt due from the attached debtor to the attaching creditor.
3. **PLEADING A JUDGMENT.**—Allegations that a certain court was of competent jurisdiction, that a certain person commenced in such court an action against another certain person for the recovery of a certain sum, and recovered judgment for the amount demanded, are sufficient to show the existence of a valid judgment, which is prima facie evidence of the existence of a debt from the defendant to the plaintiff in such action.
4. **EFFECT OF AGREEMENT NOT TO RECORD A CHATTEL MORTGAGE—FRAUD AS TO CREDITORS.**—A mere agreement between mortgagor

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40	450

and mortgagee that the mortgage shall not be filed does not render the mortgage fraudulent as to prior creditors of the mortgagor, unless they thereafter deal with the mortgagor as they would not have done had the mortgage been filed.

5. **FRAUDULENT CHATTEL MORTGAGE—CODE, § 3053.**—The fact that, after the execution and delivery of a secret chattel mortgage, the mortgagor continued to dispose of the goods for his own benefit, does not show that the conveyance was fraudulent, unless it further appears that it was done pursuant to an agreement with the mortgagee. In such case the mortgage would be fraudulent in fact as to all creditors of the mortgagor, both those existing when it was made, and those who became so subsequently, under section 3053 of Hill's Code: *Bremer v. Fleckenstein*, 9 Or. 266, and *Aiken v. Pascall*, 19 Or. 493, approved.
6. **FINDINGS—CONCLUSIONS—FRAUD.**—Findings that the parties thereto agreed that a chattel mortgage should be kept secret, that the agreement was carried out, and that the instrument was executed with intent to hinder, delay and deceive creditors, are sufficient to support a conclusion that such mortgage was void as to attaching creditors.

From Multnomah: E. D. SHATTUCK, Judge.

Action of damages against a sheriff for seizing and selling a stock of goods on which plaintiffs claimed to have a chattel mortgage. Another case between the same parties over the same questions was dismissed in this court at a previous term: *Fisher v. Kelly*, 26 Or. 249. After the failure of the first case on a technical point, this case was commenced, and came here on appeal by plaintiff from a judgment for defendant.

AFFIRMED.

For appellant there was a brief over the name of *Emmons & Emmons*, with an oral argument by *Messrs. Arthur C. Emmons and William A. Williams*

For respondent there was a brief over the name of *Cox, Cotton, Teal & Minor*, with an oral argument by *Mr. Joseph N. Teal*.

Opinion by MR. JUSTICE MOORE.

This is an action by M. Fisher, Sons & Co. against Penumbra Kelly, sheriff of Multnomah County, to recover the value of and damages for the alleged wrongful conversion of a stock of goods. The plaintiffs allege that on February 4, 1893, by virtue of a chattel mortgage executed to them by one O. C. McLeod, they had a first lien upon, and were entitled to and in the possession of, a stock of woolen and other cloths, of the value of \$5,000.00; that on said day the defendant wrongfully took said goods from their possession, and converted the same to his own use, to their damage in the sum of \$5,000.00; and that by reason of such seizure and conversion they were further damaged in the sum of \$1,000.00, on account of expenses and attorneys' and counselors' fees in establishing their right thereto, for which sums they demand judgment. The defendant, after denying the material allegations of the complaint, pleaded in justification of the acts complained of, the facts, in substance, as found by the court, and also alleged that plaintiffs' mortgage was fraudulent and void as to McLeod's creditors. The reply having put in issue some of the material allegations of new matter contained in the answer, a trial was had before the court, which made and filed the following findings:

"I. That plaintiffs are partners, and were partners at the time of the several transactions herein mentioned, doing business under the firm name and style of M. Fisher, Sons & Co.

"II. That at the times of the several transactions herein the defendant was then the duly elected, qualified, and acting sheriff of Multnomah County, Oregon.

"III. That one O. C. McLeod, in January, 1893, and until the levy of the attachment herein mentioned, was engaged in the business of a merchant tailor at Portland, Oregon, and in such business owned a stock of merchant

tailoring goods, and was indebted to the plaintiffs and others.

"IV. About the 12th day of January, 1893, the plaintiffs sent their claim against McLeod to a firm of attorneys in Portland for collection, or if the same could not be collected, then that payment thereof should be secured. McLeod, being unable to pay the claim, offered to secure the same by his real estate, but plaintiffs, after being consulted, declined to accept this, and, through their attorneys, insisted on a mortgage upon the stock. This demand McLeod refused to accede to, claiming that a mortgage upon his stock must be made public, and, when made public, would have the effect of destroying his credit, and bringing down upon him all his creditors, and stopping his business, thus placing it beyond his power to pay his creditors. Thereupon the plaintiffs, through their attorneys, agreed with McLeod that if he would execute the mortgage upon the stock they would not place the same upon record, nor permit the fact that he had executed such a mortgage to become public, but would keep the mortgage in their possession, so that nothing might be known of it. McLeod, accordingly, on January 12, 1893, and pursuant to this agreement, executed the mortgage, and the same was locked up in the safe of the attorneys for the plaintiffs, and meanwhile McLeod continued to do business as before, without any change of possession in the business of any kind whatsoever, and he continued to work up his stock into manufactured goods, and dispose of the same, accepting orders and doing business in all respects after the execution of the mortgage in like manner as before.

"V. The plaintiffs, through their attorneys, on or about February 1, 1893, made demand upon McLeod that he pay them a certain sum of money on account of his indebtedness to them, but this request Mr. McLeod refused to accede to, unless the plaintiffs would supply him

with goods for his trade of about the same value as the sum of money which he was to pay. A controversy then arose between the plaintiffs' attorneys and McLeod, and thereupon, and on or about February 3, 1893, the plaintiffs' attorneys undertook to place some one in possession of the stock, but McLeod refused to surrender possession of the same, and continued to employ his men and to operate his business in all respects as before the plaintiffs attempted to take possession, except that the plaintiffs maintained in the store some person through whom they claimed to hold possession. Such person, however, had not the keys to the store, nor had he any power or authority over the business, or over the property which he claimed to have in possession, McLeod meanwhile exercising all acts of ownership and possession thereof after such attempted seizure just as prior to the execution of the mortgage.

"VI. On the 4th day of February, 1893, Stein, Simon & Co. (who were creditors of McLeod before the execution of the mortgage above mentioned and on said day) commenced an action in the Circuit Court of the State of Oregon for Multnomah County, against McLeod, to recover the sum of \$1,334.00, with interest and costs, and in such action duly sued out a writ of attachment, and caused the same to be placed in the hands of the defendant as sheriff of Multnomah County. Thereupon, pursuant to the command of said writ of attachment, the sheriff of Multnomah County duly seized the stock of goods in controversy, and locked up the store, ejecting all persons therefrom. At the time of this levy McLeod still had the keys of the store, and was doing business in all respects as before any mortgage was executed, and neither the officer who levied the writ nor the plaintiffs in the writ knew anything of this transaction between McLeod and the plaintiffs. Thereafter, and on the same day, one H. E. Fowler, a creditor of McLeod, commenced another action in the

same court to recover the sum of \$300.00, with interest and costs, and duly sued out a writ of attachment in said action, and the same was placed in the hands of the defendant, the sheriff of Multnomah County, for execution, and was duly executed by such sheriff by seizing the property in controversy, the same being then in his possession under a prior writ in favor of Stein, Simon & Co., and the sheriff under such writs held the stock of goods until after judgment, and, under such writs and the order of court hereinafter mentioned, held such property until sale was made thereof by him under the executions, as herein-after alleged.

"VII. Afterwards the said attaching creditors, Stein, Simon & Co. and H. E. Fowler, each duly recovered judgment for the sums sued for against O. C. McLeod, and as a part of such judgment the court made an order directing that the attached property be sold, and thereupon executions were issued upon such judgments, directed to the sheriff of Multnomah County, Oregon, and commanding him to sell the attached property. Accordingly the defendant, as sheriff of Multnomah County, did sell the property on the 8th day of March, 1893, for the sum of \$1,965.00. That such sale was regularly and legally made by the defendant as sheriff, and due return of the executions made to the court, and the money realized from such sale applied in satisfaction of said judgments. And this is the conversion complained of by the plaintiffs.

"VIII. The mortgage to the plaintiffs was never placed on file, nor was any possession thereunder ever taken.

"IX. The mortgage to plaintiffs was executed pursuant to an understanding between the plaintiffs and O. C. McLeod that its existence should not be made public, and that no creditors of McLeod, or persons with whom he might desire to deal, might be advised thereof, so that the

attaching creditors did not know, and could not have ascertained, the existence of such mortgage, and such understanding was intended to deceive creditors, and tended to hinder, delay, and defraud them, and the mortgage was, therefore, executed with such intention, and received by plaintiffs, through their attorneys, with the same intention."

And the court finds as conclusions of law:

"I. That the mortgage of the plaintiffs is fraudulent and void as to the attaching creditors, Stein, Simon & Co. and H. E. Fowler, and is fraudulent and void as to the defendant, Penumbra Kelly, seizing the property under writs of attachment sued out by said creditors.

"II. That the seizure of the property under the writs of attachment in favor of the creditors, Stein, Simon & Co. and H. E. Fowler, and subsequent sale by the defendant as sheriff of Multnomah County, was regularly and legally done by the defendant as sheriff, and such acts of the defendant do not constitute a conversion of which the plaintiffs can complain.

"III. That the action should be dismissed and that the defendant should have judgment for his costs and disbursements."

The court having rendered judgment on these findings in favor of the defendant, the plaintiffs appeal.

I. There are two questions presented by this appeal: (1) Are the conclusions of law deducible from the findings of fact? And, (2) if so, are they, taken together, sufficient to support the judgment? The defendant having failed to allege that McLeod was indebted to either Stein, Simon & Co. or Fowler; counsel for plaintiffs contend that, the relation of creditor not being in issue, the defendant could not attack the bona fides of their mortgage, and hence the finding of the court that it was void as to the creditors of McLeod is erroneous. If the defendant had

relied upon the attachment of the property as the foundation of his right to continue to hold the possession thereof, the objection urged must necessarily prove fatal to the judgment complained of, for in such case the officer, being the agent of the persons who caused the goods to be attached, could attack plaintiffs' mortgage only upon the theory that they were creditors of McLeod, and, having obtained a lien upon the property for the security of their debts, they had been brought into privity with the goods, by which the officer could question the bona fides of plaintiffs' title: *Cobbey on Chattel Mortgages*, § 749; *People's Savings Bank v. Bates*, 120 U. S. 556 (7 Sup. Ct. 679). The general creditor is in no position to raise the question that the mortgage is void as to him until he has seized the property covered by the chattel mortgage, or secured some lien thereon: *Union National Bank v. Oium*, 3 N. D. 193 (54 N. W. 1034). And the officer who acts for such creditor, in justifying an attachment of the property and his right to hold the possession thereof, must allege and show a debt due to his principal from the defendant in the writ: *Damon v. Bryant*, 2 Pick. 411. The rule is universal that an officer, in justifying his right to hold the possession of attached property claimed by a stranger, must allege and prove all the facts necessary to support the writ, and also that a debt existed in favor of the attaching plaintiff against the defendant therein; and having thus established the fact that the person for whom he acted is a creditor of such defendant, and by his lien upon the property had become privity with it, he may then attack the title of the person claiming the property so attached: *Sanford Mfg. Co. v. Wiggin*, 14 N. H. 441 (40 Am. Dec. 198); *Thornburgh v. Hand*, 7 Cal. 554; *Noble v. Holmes*, 5 Hill, 194; *Newton v. Brown*, 2 Utah, 126; *Trowbridge v. Bullard*, 81 Mich. 451 (45 N. W. 1013); *Glazer v. Clift*, 10 Cal. 303; *Braley v. Byrnes*, 20 Minn. 435; *Howard*

v. *Manderfield*, 31 Minn. 337. "When the officer," says Mr. Drake in his work on Attachment (6th Ed., § 185a), "attaches property found in the possession of the defendant, he can always justify the levy by the production of the attachment writ, if the same was issued by a court or officer having lawful authority to issue it, and be in legal form. But when the property is found in the possession of a stranger claiming title, the mere production of the writ will not justify its seizure thereunder; the officer must go further, and prove not only that the attachment defendant was indebted to the attachment plaintiff, but that the attachment was regularly issued. If, in the attachment suit, judgment was rendered for the plaintiff, that will establish the indebtedness; if not, the officer must prove it otherwise, in order to justify his proceeding." The reason for this rule is found in the fact that the person causing the property of another to be attached may have done so to protect the latter's interest, and prevent a bona fide creditor from acquiring a lien thereon; and since the writ of attachment is usually issued by a ministerial officer, upon an ex parte application therefor, it is necessary for the sheriff or other officer, in justifying his proceedings thereunder, to allege and prove that the writ was properly issued, and that a debt existed as the foundation of the right to seize property claimed by a stranger.

2. But when a judgment has been rendered in the action in which property has been attached, the relation of creditor and the recognition of a debt is thereby established: *Rihney v. Stryker*, 28 N. Y. 45 (84 Am. Dec. 324), and, this being so, the conclusion of the court upon the question must, upon principle, relate back to and render unnecessary the allegation and proof of the existence of a debt as a justification for the attachment, for the office of a writ of attachment is to hold the property of the debtor until an execution can be issued upon a judgment ren-

dered in the action: *Trowbridge v. Bullard*, 81 Mich. 451 (45 N. W. 1013). And, upon the levy of the latter writ upon the property under attachment, the object of the former has been duly accomplished. Judgment having been rendered in the actions of Stein, Simon & Co. and Fowler against McLeod, and the property so attached ordered to be sold, in pursuance of which executions were issued and levied thereon, the officer no longer held the goods under the writs of attachments, and hence it was unnecessary to allege or prove the existence of a debt as the foundation of his right to maintain possession thereof, or to enable him to question the sufficiency of plaintiffs' title thereto, since he was in a position to do this by alleging and proving the judgments that had been given. It must be admitted that before a person can attack a transfer of personal property, either actual or constructive, he must show himself to be a creditor, or representing one, and this he cannot do merely by a production of the execution, which, taken by itself, is not evidence of an indebtedness; and an officer justifying the seizure of such property, and attacking a sale or mortgage thereof as fraudulent, must produce the execution in pursuance of which he acted, together with the judgment under which the same was issued: *Ford v. McMaster*, 6 Mont. 240 (11 Pac. 669); *Paige v. O'Neal*, 12 Cal. 483; *Bickerstaff v. Doub*, 19 Cal. 109 (79 Am. Dec. 204); *Goodnow v. Smith*, 97 Mass. 69.

3. It is also contended that the allegations of the answer are not sufficient to show the rendition of a valid judgment, and that the judgments pleaded therein are not evidence against the plaintiffs, who were strangers to the record, that either Stein, Simon & Co. or Fowler was a creditor of McLeod. In pleading a judgment of a court of special jurisdiction it is not necessary to state the facts conferring jurisdiction, but such judgment may be stated to have been duly given or made: Section 86, Hill's Code.

In *Page v. Smith*, 13 Or. 410 (10 Pac. 833), which was an action to recover the possession of a certain safe, it was alleged in the answer "that said safe was seized on attachment as the property of the said Linder in an action in justice's court, in which one August Buckler was plaintiff, and said Linder was defendant; that judgment was duly rendered against Linder, and execution issued thereon, and that by virtue of said execution the safe was duly advertised for sale and sold to the defendant." THAYER, J., in reviewing the pleading, says: "The subsequent allegations in the answer, that judgment was duly rendered against Linder, and execution issued thereon, and that by virtue of said execution the safe was sold, were not a sufficient statement of the facts of the recovery of a valid judgment. They do not show that any action was commenced in any court. The statute has very much simplified the pleading of judgments of justices' courts, but I think it still necessary to allege the commencement of the action in the particular court, and to specify the claim upon which it is brought, so as to show that the court had jurisdiction of the subject-matter." In the case at bar the defendant alleges that Stein, Simon & Co. duly commenced an action in the Circuit Court of said county and State against one O. C. McLeod for the recovery of \$1,334.00, and recovered judgment for the amount demanded; and that Fowler commenced an action in said court against the same party for the recovery of \$300.00, and obtained a like judgment. An action shall be deemed commenced as to the defendant when the complaint is filed and the summons served on him (section 14, Hill's Code), and hence the allegation in each case that the action was commenced against McLeod in said court was equivalent to an averment that the complaint had been filed, and the summons served on him, thus giving to the court jurisdiction to render the said judgments, and the answer, hav-

ing alleged that the actions were commenced and the judgments given by a court of competent jurisdiction, stated the existence of an indebtedness due from McLeod to the respective plaintiffs in said actions. The reply did not deny the rendition of the judgments in favor of the attaching creditors, the issue of the executions thereon, the sale of the stock of goods thereunder, the return of said writs, the satisfaction of the judgment in favor of Stein, Simon & Co., or the application of the remainder of the proceeds of such sale upon the execution issued upon the Fowler judgment, and these facts having been alleged in the answer were thereby admitted, rendering evidence thereof and findings by the court thereon unnecessary. It is true the judgments may have been collusively obtained, and that no debt was due from McLeod to either Stein, Simon & Co. or Fowler; but the plaintiffs, having neglected to put these facts in issue, are bound thereby, and it must be presumed that an indebtedness existed, and that the judgments were properly rendered.

4. The remaining and most important inquiry is whether the chattel mortgage is void as to McLeod's creditors. The court found, in effect, that the mortgage was executed in accordance with the terms of an agreement entered into between plaintiffs and McLeod, in pursuance of which the instrument was not filed; that the plaintiff never obtained possession of the property covered thereby; and that the defendant and those for whom he acted had no knowledge of the transaction between McLeod and the plaintiffs until after the property was attached. These findings, being supported by evidence and predicated upon issues made by the pleadings, are binding on this court, and, considering them alone, can it be said, as a matter of law, that the mortgage is void as to Stein, Simon & Co., whom the court finds were creditors of McLeod before its execution? In *Barton v. Sit-*

lington, 128 Mo. 164 (30 S. W. 514), an agreement was entered into between the mortgagor and mortgagee to the effect that a certain chattel mortgage should not be placed upon record unless the creditors of the mortgagor proceeded to collect their debts, or took some steps that would be likely to jeopardize the interests of the mortgagee. The sheriff, in pursuance of an execution issued upon a judgment rendered against the mortgagor, levied upon the property covered by the mortgage, and in an action brought by the mortgagee against the officer to recover the property in his possession it was contended that such agreement, as a matter of law, rendered the mortgage fraudulent and void as to the prior creditors of the mortgagors, but it was held that such creditors could not complain of a failure to place the mortgage on record, unless they dealt with the mortgagor after its execution as they would not have dealt had it been recorded, and that, the debt upon which judgment was rendered having been incurred prior to the execution of the mortgage, the creditor was not defrauded by such agreement or the failure to record the mortgage. See also *Jones on Chattel Mortgages*, § 337a; *Johnson v. Stellwagen*, 67 Mich. 10 (34 N. W. 252).

5. It is alleged in the answer that it was understood and agreed by and between the mortgagor and mortgagee that the mortgagor should continue to run his business as he had theretofore done, buying or selling for cash or credit for his own benefit, paying bills for current expenses, and conducting said store, and taking orders for suits of clothes, and cutting the patterns up into said suits, disposing of the same, and holding the proceeds to his own use, and these allegations are put in issue by the reply. If the court had made a finding upon this issue adverse to the plaintiffs, it must be conceded that the mortgage is void as to the creditors of McLeod. There is nothing on the

face of the instrument, however, which would indicate that it was executed for the use or benefit of the mortgagor, and in such case it cannot be said to be void in law. But when it appears from extrinsic evidence that the mortgagor is to retain possession of the goods mortgaged, and sell the same in the usual course of business, the mortgage is fraudulent in fact, for the reason that it is for the mortgagor's own use and benefit, and comes within the inhibition of section 3053, Hill's Code, which declares all transfers of goods and chattels made in trust for the person making the same shall be void as against the creditors, existing or subsequent, of such person: *Orton v. Orton*, 7 Or. 478 (33 Am. Rep. 717); *Jacobs v. Ervin*, 9 Or. 52; *Bremer v. Fleckenstein*, 9 Or. 266; *Aiken v. Pascall*, 19 Or. 493 (24 Pac. 1039). The fourth finding of fact, after stating the agreement entered into between the mortgagor and mortgagees, is as follows: "McLeod accordingly, on January 12, 1893, and pursuant to this agreement, executed the mortgage, and the same was locked up in the safe of the attorneys for plaintiffs, and meanwhile McLeod continued to do business as before without any change of possession in the business of any kind whatsoever, and he continued to work up his stock into manufactured goods and dispose of the same, accepting orders and doing business in all respects after the execution of the mortgage in like manner as before." This finding is probably equivalent to a statement that McLeod disposed of the stock of goods for his own use and benefit, but it does not appear therefrom that such disposal was in pursuance of any agreement entered into between the mortgagor and mortgagees, or that the latter had knowledge of, consented to, or ratified, such disposal, in the absence of which it does not show that the plaintiffs had given McLeod power to dispose of the property covered by the mortgage.

6. Here was a failure of the court to find upon an

issue made by the pleadings, the materiality of which must be determined by a consideration of the question whether it could be stricken from the answer without leaving it insufficient as a defense: Section 95, Hill's Code. The ninth finding of fact is to the effect that the mortgage was given and received pursuant to an agreement which was intended to deceive creditors. The instrument not having been filed, created a presumption of fraud against the creditors of McLeod, during his possession of the property, disputable only by making it to appear on the part of the plaintiffs that it was made in good faith, for a sufficient consideration, and without intent to defraud the creditors of the mortgagor: Subd. 40, § 776, Hill's Code.* It has been held by this court that a showing of these facts overcomes such presumption, establishes the validity of the mortgage, and renders the security superior to a subsequent attachment or mortgage of the same property, even in the absence of notice of the unfilled mortgage: *Marks v. Miller*, 21 Or. 317 (14 L. R. A. 190, 28 Pac. 14); *Davis v. Bowman*, 25 Or. 189 (35 Pac. 264). The defendant having alleged that the chattel mortgage had not been filed, and that he and those for whom he acted had no notice or knowledge thereof, the burden was thereby cast upon the plaintiffs to allege in the reply and prove at the trial that the mortgage was executed in good faith, for a sufficient consideration, and without intent to defraud McLeod's creditors. Examining the reply, we find that it fails to allege either of these facts, and the effect of the court's findings thereon is that McLeod was indebted to the plaintiffs, and gave a mortgage on his stock of goods as security therefor. The finding that the mortgage was executed with the intent to deceive creditors, and tended

* The occurrences on which this case is based took place a few days before the legislature passed the act relating to the filing of chattel mortgages found in Laws 1893, p. 30.—REPORTER.

the defendant them, strengthens the presumption arising from the failure to file the instrument, which is predicated upon an issue tendered, and from it the conclusion of law is that the mortgage was void as to the attaching creditor, in reference to the issue that the mortgagor had power to dispose of the goods for his benefit, which might have been stricken from the issue without leaving it insufficient as a defense. The conclusions of law are, therefore, deducible from the facts of fact, and together are sufficient to sustain the judgment, which is affirmed.

AFFIRMED.

Argued April 13; decided November 9, 1896.

STATE v. POMEROY.

(46 Pac. 797.)

QUESTION AS TO CHANGE OF VENUE.—Under section 1222, Hill's Code, authorizing the court to order the place of trial changed where it appears by affidavit that a fair and impartial trial cannot be had, the granting of such order rests in the sound discretion of the trial court, and in this case it does not appear that this discretion was abused to any substantial injury of the accused.

JURY—DIRECTING VERDICT.—Where there is any evidence that tends to show guilt it is the duty of the court to submit to the jury the question of defendant's guilt or innocence (*State v. Meyer*, 18 Or. 200, cited and approved), and in this instance the testimony justified a submission to the jury.

INFERENCE FROM POSSESSION OF STOLEN PROPERTY.*—The inference from the possession of stolen property is entirely one of fact and never rises to the dignity of a conclusive presumption of guilt, and is strong or weak according to the surrounding circumstances: *State v. Hale*, 12 Or. 352, cited and approved.

RECEIVING STOLEN PROPERTY.—On a prosecution for receiving and concealing stolen goods, under section 1774 of Hill's Code, the fact that defendant secreted and harbored the thieves, so as to aid them to escape arrest, thereby rendering himself amenable as an accessory to the larceny, is no defense, if he also received and concealed the property, knowing it to be stolen.

*See also *State v. Huffman*, 16 Or. at page 24, and *Meyer v. Thompson*, 10 Or. 194.—REPORTER.

5. **INVADING PROVINCE OF JURY—EXPRESSION OF OPINION BY TRIAL JUDGE.**—An instruction that the jury have no right to reject the testimony of the wife and daughter of the accused simply because it came from a source in which there would be strong motives to give the "most favorable coloring possible" to the facts on behalf of the accused, is prejudicial error, as an expression of opinion on the motives of the witnesses.

From Washington: THOS. A. McBRIDE, Judge.

Calvin Pomeroy was indicted and convicted in Washington County on a charge of buying, receiving, concealing, and attempting to conceal stolen property. The errors assigned are: First, the denial of the motion for a change of venue; second, the refusal of the court to instruct the jury that there had not been sufficient evidence produced to sustain a conviction, and to direct them to return a verdict of not guilty; and, third, the giving and refusing to give certain other instructions.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Thos. H. Tongue*.

For the State there was a brief and an oral argument by *Mr. W. N. Barrett*, District Attorney, and an additional oral argument by *Mr. Cicero M. Idleman*, Attorney-General.

Opinion by MR. JUSTICE WOLVERTON.

I. The motion for a change of venue is based upon the affidavits of the defendant and his counsel, which show, in substance, that at different times prior to the commission of the alleged offense charged in the indictment three sons of the defendant had been convicted of petit larceny committed within the county; that subsequent to such convictions there had been a great number of similar crimes committed therein; that a great many people, with-

out any knowledge on the subject, or touching the identity of the offenders, did not hesitate to publicly assert that they were committed by some member of the defendant's family, and that the defendant himself was guilty of such things, without the slightest evidence upon which to base the assertion; that it had been charged that one of the sons of defendant was concerned in the theft of the goods which defendant is accused of concealing; and that in consequence thereof the feeling in the county became so strong that in different parts thereof the people talked quite freely of lynching the defendant, and in some places expressed a determination to do so; that fictitious, false, and exaggerated reports of the manner of defendant's arrest and of his conduct and demeanor prior thereto had been persistently and extensively circulated throughout the county; that such things had been talked of in Hillsboro, and, as the informants believe, among the jurors, and that by reason thereof a widespread and deep-seated public prejudice sprang up against the defendant and his family, to such an extent that it is believed a majority of the people of the county who have heard of the matter have, without any knowledge of the facts, formed an opinion, and many of them have expressed it to the effect that the defendant is guilty of the crime charged; and that by reason of all these facts and circumstances the defendant could not expect a fair and impartial trial within the county. Counter affidavits were filed by the state, showing, in effect, that the crime of which the defendant is charged was committed in the western part of the county; that while there had been some discussion of the alleged crime in and around Greenville, West Union, and Forest Grove, yet there are large sections of the county where the defendant and his family are scarcely known, and the incidents surrounding the commission of the crime but little talked of, if at all, and that many people in the county

have never heard of the alleged crime with which defendant is charged.

Upon the showing thus made the motion was overruled. It is usually regarded that such a motion lies largely, if not exclusively, within the sound discretion of the trial court, the exercise of which is judicial in its nature, and is subject to review only when abused to the prejudice of the applicant, and that fact is in some way made to appear: 3 Am. & Eng. Enc. Law (1st Ed.), 108. Our statute (Hill's Code, § 1222) provides that "the court may order the place of trial to be changed * * * when it appears by affidavit, to the satisfaction of the court, that a fair and impartial trial cannot be had," etc. Under similar statutes it has been held that the exercise of the power granted by this section is within the sound discretion of the trial court: *State v. O'Rourke*, 55 Mo. 440-446; *State v. Sayers*, 58 Mo. 587. In *State v. Whitton*, 68 Mo. 91, upon a question of alleged prejudice, the finding of the trial court was held to be conclusive. In *State v. Guy*, 69 Mo. 432, the court say: "The finding of the Circuit Court on that issue (question of prejudice) is conclusive, and not to be interfered with by this court, unless it appear that palpable injustice has been done." Again the same court, in *State v. Burgess*, 78 Mo. 235, say: "The trial of the issue made on a petition for a change of venue is by the court, and unless manifest error occur on the trial of that issue, to the prejudice of the accused, we cannot interfere with the finding of the court. There was evidence to sustain the finding." In *State v. Brownfield*, 83 Mo. 451, the court, in passing upon facts very similar to those suggested by the case at bar, say: "In this state of the evidence we cannot say that the court, in overruling the application of defendant, abused its discretion, and it is only when it appears that such discretion has been palpably abused that we can interfere under the rul-

ing of this court." See also *State v. Hill*, 72 N. C. 352; *Watson v. Whitney*, 23 Cal. 375; *Hyde v. Harkness*, 1 Idaho 601; *State v. Hunt*, 91 Mo. 490 (3 S. W. 858); *People v. Yoakum*, 53 Cal. 566; *People v. Perdue*, 49 Cal. 425; *People v. Mahoney*, 18 Cal. 180. In the case at bar it does not appear that any difficulty whatever was experienced in obtaining an unbiased jury, a circumstance which leads to the conclusion that the accused suffered by the refusal to grant the motion no injustice, so that it is not obvious that there was an abuse of its discretion by the trial court, and its action in that respect will not be disturbed.

2. The evidence adduced at the trial tended strongly to show that John Pomeroy, a son of the defendant, and one John Holcomb stole the goods which defendant is charged with concealing, from the store of Briggs Bros. in the Town of Dilley, Washington County, on the night of March 21, or the morning of the 22d, 1895; that on the morning of the 23d these parties took the goods to the defendant's barn, where they were found about noon of the same day, covered with straw. The thieves were traced to this locality by the track of a horse and buckboard, supposed to be the property of one Lousignont. The horse was found in the barn, and the buckboard under a shed close at hand. E. B. Sappington, a constable, one of the persons instrumental in the apprehension of the accused, being called as a witness for the state, testified as follows: "I took a track of the vehicle that came out of the gate (at Lousignont's), and tracked it as far as Mr. Pomeroy's field or pasture, or a gate that goes into his pasture, in sight of his house. I didn't go any further then, but went back to Greenville." After stating that he procured the assistance of Joseph and Andrew Vaughn, the witness continues: "We went down on the track to the gate and tracked the vehicle inside, and just as we got inside, Joe called my attention to a man coming down

from the barn on a ladder; then we rode as fast as possible, we had probably two hundred yards to go to get across a ravine to the barn, and when we got there I got down and opened the gate, and there was a man standing right on the inside, Mr. Pomeroy (the defendant). He went on the inside of the house, and I heard Joe Vaughn ask him who drove that rig in there, and he said he didn't know, * * * and he went on towards the house, and I caught up with him, and told him we were hunting for Holcomb, and asked him if he was there, and he said he didn't know whether he was or not, and it was none of our business; he went inside the house and came out with a shot gun, and told us not to come in, he had enough of that kind of foolishness around there; and for us to get out of there; just then Andrew Vaughn, who had gotten off the road, came across hollowing to us, and I turned around and saw two men running from behind the barn across the field going west." The witness recognized one of them as Holcomb. After relating his experience in giving chase to the fugitives he continues: "I took up my watch between the barn and the house; after a while Mr. Pomeroy came out, and said he would go and fix his barn, or something, I don't know what. He went on the inside, and I kept on the outside. I got as close to the barn as I could, and I heard him go around to that corner (in proximity to the goods), and work in the straw. Of course I couldn't see; he would work there a little while, and he would come out with a board and throw it down and go back in again. He made several trips, and I could hear him in this straw. I heard the straw moving and him going in there, and after while he came out and said he would have to go to Greenville." After the accused left, the witness went into the barn and found the goods. Among them were a hat and two overcoats belonging to John Pomeroy and John Holcomb. Joseph Vaughn gave

testimony of a like nature, where he describes the accused when they first saw him as being well up to the top of the rafters in the roof of the barn; that he turned around and looked over his shoulder towards them and being talking to him.

At 2 P. M. the sheriff who had come up while the accused was in the barn testified that when he returned home I asked him whose horse and wagon that was, and he disclaimed any knowledge or knowing whose it was, and he didn't know. I asked him who had been there, and he said there hadn't been any one there. I asked him whether I told you I told you that Hughson had not been there and he said they had not been there. I told him there was quite a quantity of goods stored out there, and it seemed to me very strange a horse and wagon would be there and he didn't know whose it was nor who brought it there. I told he said it might seem strange, but he didn't know a thing about it there hadn't been a word in the place that he knew of having that night, that was going to the barn. Eugene C. Hughes testified that the reason he had with the accused about the horse was to prove that is the case. I asked him whether Hughson was there that night, and he said he was not that night, and I said "Was your son there?" and he said "No, I haven't seen him for three months." The defendant in explanation of his presence upon the barn when first seen, gave evidence tending to show that he was up there for the purpose of readjusting some of the rafters which had been displaced by the wind the night before, and was coming down when seen by Leppington and Vaughn. In this he was corroborated by his daughter, who, as they testified, assisted him in replacing and securing the rafters. The boards which he carried out he explained were taken in and used by him in getting the rafters in place. The defendant, his wife,

and daughter all testified that John Pomeroy and John Holcomb came there in the morning about six o'clock and wanted breakfast; that the accused objected to their being there, but that the wife gave them their breakfast, and they left the house about seven; while they were at breakfast the accused and his daughter were engaged in milking some cows at the barn. John Pomeroy's wife was stopping with defendant's family at the time. John himself and Holcomb were fugitives from justice, and defendant had heard that officers had been watching his house and premises before for the purpose of apprehending them. He denied all knowledge of the goods prior to the time that he was informed of their discovery by the officers.

Among other instructions asked for, the defendant's counsel requested the court to give the following, viz: "There has been no sufficient evidence to sustain a conviction of guilty as charged in the indictment, and I therefore instruct you to render a verdict of not guilty." All the evidence produced on the trial is here in the bill of exceptions, and we are asked to pass upon it, and say whether it is sufficient to warrant a conviction of the crime charged. It is strenuously insisted that the State has not shown that the accused had any knowledge whatever of the presence of the goods in his barn, and, further, that the evidence is too meager and unreliable from which to determine that he either received or concealed, or attempted to conceal, them. Knowledge that the goods were stolen, and concealment, or an attempt to conceal them, are essential elements that go to constitute the crime with which the defendant is charged, and the rule seems to be that where there is some evidence pertinent to go to the jury upon the issue it becomes a question of fact for them to determine, and it is not permissible for the court to invade the province of the jury in respect thereto. As put by

to hinder, delay, and defraud them, strengthens the presumption of fraud arising from the failure to file the instrument. This finding is predicated upon an issue tendered by the defendant, and from it the conclusion of law is deducible that the mortgage was void as to the attaching creditors, without reference to the issue that the mortgagees gave the mortgagor power to dispose of the goods for his own use and benefit, which might have been stricken from the pleading without leaving it insufficient as a defense. The conclusions of law are, therefore, deducible from the findings of fact, and together are sufficient to support the judgment, which is affirmed.

AFFIRMED.

Argued April 13; decided November 9, 1896.

STATE v. POMEROY.

(46 Pac. 797.)

1. DISCRETION AS TO CHANGE OF VENUE.—Under section 1222, Hill's Code, authorizing the court to order the place of trial changed when it appears by affidavit that a fair and impartial trial cannot be had, the granting of such order rests in the sound discretion of the trial court, and in this case it does not appear that this discretion was abused to any substantial injury of the accused.
2. EVIDENCE—DIRECTING VERDICT.—Where there is any evidence that fairly tends to show guilt it is the duty of the court to submit to the jury the question of defendant's guilt or innocence (*State v. Jones*, 18 Or. 260, cited and approved), and in this instance the testimony justified a submission to the jury.
3. INFERENCE FROM POSSESSION OF STOLEN PROPERTY.*—The inference from the possession of stolen property is entirely one of fact—it never rises to the dignity of a conclusive presumption of guilt, and is strong or weak according to the surrounding circumstances: *State v. Hale*, 12 Or. 352, cited and approved.
4. RECEIVING STOLEN PROPERTY.—On a prosecution for receiving and concealing stolen goods, under section 1774 of Hill's Code, the fact that defendant secreted and harbored the thieves, so as to aid them to escape arrest, thereby rendering himself amenable as an accessory to the larceny, is no defense, if he also received and concealed the property, knowing it to be stolen.

*See also *State v. Huffman*, 16 Or. at page 24, and *Meyer v. Thompson*, 16 Or. 194.—REPORTER.

30	16
32	216

30	16
33	188

30	16
36	198
36	304
30	16
39	93

30	16
41	354
41	368
41	384

30	16
48	56
48	211

30	16
47	498

30	16
48	174

5. **INVADING PROVINCE OF JURY—EXPRESSION OF OPINION BY TRIAL JUDGE.**—An instruction that the jury have no right to reject the testimony of the wife and daughter of the accused simply because it came from a source in which there would be strong motives to give the "most favorable coloring possible" to the facts on behalf of the accused, is prejudicial error, as an expression of opinion on the motives of the witnesses.

From Washington: THOS. A. McBRIDE, Judge.

Calvin Pomeroy was indicted and convicted in Washington County on a charge of buying, receiving, concealing, and attempting to conceal stolen property. The errors assigned are: First, the denial of the motion for a change of venue; second, the refusal of the court to instruct the jury that there had not been sufficient evidence produced to sustain a conviction, and to direct them to return a verdict of not guilty; and, third, the giving and refusing to give certain other instructions.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Thos. H. Tongue*.

For the State there was a brief and an oral argument by *Mr. W. N. Barrett*, District Attorney, and an additional oral argument by *Mr. Cicero M. Idleman*, Attorney-General.

Opinion by MR. JUSTICE WOLVERTON.

1. The motion for a change of venue is based upon the affidavits of the defendant and his counsel, which show, in substance, that at different times prior to the commission of the alleged offense charged in the indictment three sons of the defendant had been convicted of petit larceny committed within the county; that subsequent to such convictions there had been a great number of similar crimes committed therein; that a great many people, with-

and the jury are satisfied that at the time the said John Holcomb and John Pomeroy had committed the crime of larceny in stealing the goods charged in the indictment, and that the defendant knew that said goods had been stolen by John Pomeroy and John Holcomb, then the defendant would be guilty of being accessory to the crime of larceny, and it would be your duty to acquit him." "If the jury has a reasonable doubt whether the defendant, upon the occasion described in the indictment, was endeavoring to shield the persons who had committed the larceny, and assist in their escape, or whether he was engaged in buying, receiving, or concealing, or attempting to conceal, stolen property, then, in that case, also, it would be your duty to give the defendant the benefit of the doubt, and acquit him." "The State cannot split one transaction, and make out of it more than one crime. The defendant could not at the same time be guilty of receiving stolen goods and an accessory after the fact to the crime of larceny, by aiding those who had committed the crime." The crime of receiving, concealing, or attempting to conceal, stolen property is made a substantive offense by the statute (Hill's Code, § 1774), and the defendant was on trial charged with such offense. He may have been guilty at the same time of aiding in the escape of John Pomeroy and John Holcomb, thus rendering himself amenable as an accessory to the crime of larceny, but if he has done those things which are essential to the crime charged, there seems to be no good reason why one should bar a prosecution for the other. The doctrine of carving can have no application here, as that can only be made available under a plea of former conviction or acquittal. The court quite fully, and very correctly and explicitly, covered the subject by the following instruction: "The defendant cannot be convicted on this indictment for secreting or harboring John Pomeroy and John Holcomb.

If Holcomb and Pomeroy were charged with a crime in Multnomah County, and the defendant, inspired by a desire to aid them to escape arrest, received them, and concealed them with intent to aid them to escape from such arrest, or if you have a reasonable doubt as to whether his conduct was done for that purpose only, he cannot be convicted; but if, with a guilty knowledge that the goods described in the indictment had been stolen, he secreted them with a view of preventing the officers of the law from finding them, and thereby detecting and arresting Holcomb and Pomeroy, the fact that he also desired their escape from arrest on the Multnomah County charge would not be a defence." So the court was not in error in refusing to entertain the charge, as requested.

5. Another instruction is as follows: "Every witness is presumed to speak the truth, but this presumption may be overcome by evidence; and you have a right in considering the testimony of every witness, to consider the manner in which he testifies upon the stand, to consider his motives, and his relationship to the case. In this case the defendant and members of his family have given testimony. You have no right to reject the testimony they have given, simply because it comes from a source in which there would be strong motives to give the most favorable coloring possible to the facts on behalf of the defendant, but you have a right to consider, and you should consider, that testimony the same as you would other testimony, taking into account the relationship of the parties and the motives which may induce them to testify. That is to say, in estimating the value of the defendant's testimony you have a right to consider what he has at stake in this case, the gravity of the charge against him, and the motives which might induce him to misrepresent or speak falsely in regard to it; and you have a right to consider the motives of the other members of

the family, and, after considering these, not only in their own intrinsic light, but in the light of all the testimony in the case, give such testimony the value you consider, under all the circumstances of the case, it is entitled to in coming to a final conclusion." Objection is urged to this instruction as tending to discredit the testimony of the wife and daughter of the defendant, by giving undue prominence to the motives which might induce them to color their testimony with a view to his exculpation, and we think it is well taken. The jury were told in effect that the wife and daughter had strong motives for giving the most favorable coloring possible in behalf of the accused to the facts which they were called to delineate. The vice of this instruction consists in the fact that it is an expression of an opinion by the trial court touching the motives of these witnesses. The jury might have inferred from the language employed that the court not only believed that these witnesses had motives for coloring their testimony, but that such motives were strong for the most favorable coloring possible. The expression in part runs in the superlative, and could hardly have escaped their attention. Motive is a thing itself to be proven, or such facts established from which it may be inferred, and, when disclosed by the testimony, its nature and degree is a fact to be determined, so also is the probability that the witness has indulged it to the impairment of the oath which he has taken to tell the truth, the whole truth, and nothing but the truth. The statute provides that "Every witness is presumed to speak the truth." But the presumption may be overcome. How? "By evidence * * * affecting his character or motives:" Hill's Code, § 683. So the jury must determine whether a motive exists, its nature, and whether or not the testimony of the witness has been colored or warped by it. It all goes to the credibility of the witness, of which they are the exclusive judges: See

Commonwealth v. Barry, 9 Allen, 276. Mr. Thompson, in his work on Trials (2 Thompson on Trials, § 2421), says: "It is a rule, applicable alike in civil and criminal cases, that it is error for the judge, directly or inferentially, to express an opinion to the jury, or in their hearing, as to the credibility of a particular witness, or as to the weight which they should attach to his testimony." As supporting this rule see *McMinn v. Whelan*, 27 Cal. 300; *Rice v. State*, 3 Tex. App. 451; *People v. Christensen*, 24 Pac. 888; *State v. Brown*, 76 N. C. 222. For error of the court below in this particular its judgment is reversed and a new trial ordered.

REVERSED.

Argued March 19; decided October 19, 1896.

SCHMURR v. STATE INSURANCE CO.

(46 Pac. 363.)

30	29
139	848
239	402

1. FIRE INSURANCE—PROOF OF LOSS.—An insurance company must act fairly toward its policy-holders, and when an honest attempt has been made to present proofs of loss, the company must, with reasonable promptness, state definitely its objections to the proofs or it will be estopped from urging them; thus a return of proofs of loss with the mere statement that they were "declined and objected to" is practically an acceptance, for the objection is too indefinite to be obviated.
2. IDEM.—On the same principle, an objection that the certificate is not made by the proper officer is waived unless made when the proofs are presented.
3. PAROL WAIVER OF CONDITIONS OF POLICY.—Where a company, after full knowledge of facts that render void one of its policies, retains the premium and fails to cancel the policy, it waives the forfeiture, and this can be done by conduct or by parol, although the policy itself provides that it shall be in writing.

From Multnomah: E. D. SHATTUCK, Judge.

Action by John Schmurr against the State Insurance Co., of Salem, Oregon, to recover on a policy of fire insurance. After a jury trial plaintiff had judgment as prayed, from which defendant appeals.

AFFIRMED.

For appellant there was a brief over the name of *R. & E. B. Williams*, with an oral argument by *Messrs. W. T. Slater and Emmet B. Williams*.

For respondent there was a brief over the name of *McGinn, Sears & Simon*, with an oral argument by *Mr. Nathan D. Simon*.

Opinion by MR. JUSTICE BEAN.

This is an action upon a fire insurance policy which provides that as a part of the proof of loss the assured "shall produce a certificate under the hand and seal of a magistrate or notary public (nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the assured), stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount which such magistrate or notary public shall certify"; and, if the claim be for a building, "the duly verified certificate of some reliable and responsible builder as to the actual cash value of it immediately before said fire"; and also that "any notice given to, representation made to, or by, or knowledge of, any solicitor or agent representing this company, of any fact, change, act, or thing relating to the property, title, occupancy, incumbrances, or otherwise, insured under this policy subsequent to the issuing of the same, shall not in anywise be binding on, or be regarded as notice to, or knowledge of, this company; but, in order to be binding on the company, must be endorsed in writing hereon, as provided in the terms and conditions of this policy"; and, "that in case of * * * the erection of adjoining buildings * * * without being immediately notified to this company and its consent thereto obtained in writing

* * * this policy shall thereafter cease and be null and void."

The action is defended upon the grounds (1) that no proof of loss was made as provided in the policy; and (2) that the contract of insurance became null and void by the erection of an adjoining building within the prohibited limits without the written consent of defendant. The plaintiff claims, however, that he furnished sufficient proof of loss, and that the stipulation of the policy in reference to the effect of the erection of adjoining buildings was waived by the company. The insurance was effected through Irle, a soliciting agent of defendant, with authority to receive and forward applications to the home office, countersign and deliver policies when issued by that office, and to collect the premiums thereon. After the delivery of the policy, but before all the premium had been paid, an electric car barn was built within eight or nine feet of the building insured, and when plaintiff came to make the deferred payment he notified Irle of that fact, and inquired as to the amount of additional premium required on account thereof. With this knowledge of the increase in the risk, Irle accepted the balance due on the premium, and wrote to the company to ascertain the additional amount required on account of the erection of the car barn, and upon receipt of its answer notified plaintiff of the amount, but it was never paid nor the policy cancelled. Within a short time after the fire, the plaintiff, through his attorney, made out and forwarded to the home office of the company proof of loss, regular in all respects, except that it had neither a certificate of the magistrate or notary public nearest the fire, nor a builder's certificate as required by the policy. Upon its receipt by the company it was promptly returned with the objection that "it does not show whether the conditions of the policy have been violated or not, furnishes no proof as to

the value of the house except the man's mere statement that it is worth so much, and in fact does not comply with the terms and conditions of the policy." Thereupon one of the attorneys of the plaintiff immediately affixed his certificate as a notary public in the form and to the effect required by the policy, and again forwarded it to the company, with a letter calling attention to the certificate, and saying: "We do not know in what other respect the proof of loss is defective, as it follows strictly the proofs of loss which are used by your company. If in any other respect it is defective will you kindly inform us?" A few days afterward the defendant returned the proof saying that it "is returned herewith, declined and objected to." Upon this record the two questions presented are (1) does the proof of loss furnished by the plaintiff sustain the allegation of the complaint that proof of loss had been regularly made; and (2) did the company waive the provision of the policy in reference to the effect of the erection of adjoining buildings? Both these questions must be answered in the affirmative.

1. The law is settled that where the assured, in attempting in good faith to comply with the provisions of a policy, furnishes to the insuring company, within the time stipulated, what purports and is intended to be proof of loss, the company must point out particularly any defects therein if it intends to rely upon them. If it fails to do so, objection cannot thereafter be made to its sufficiency: *May on Ins.*, §§ 468, 469; *Wood on Fire Ins.*, § 452; *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64 (34 Am. Rep. 106); *Insurance Co. v. Block*, 109 Pa. St. 535 (1 Atl. 523); *Myers v. Council Bluffs Ins. Co.*, 72 Iowa, 176 (33 N. W. 453); *Mercantile Ins. Co. v. Holthaus*, 43 Mich. 423 (5 N. W. 642); *Northern Assur. Co. v. Samuels*, 33 S. W. 239 (Tex. Civ. App.). Now, in this case the defendant failed to point out any particular objection to the proof as fur-

nished, except that the value of the building was shown only by the statement of the assured. The objections that the proof did not show whether the conditions of the policy had been violated or not, and that it did not comply with the terms and conditions of the policy, are altogether too general: *Insurance Co. v. Block*, 109 Pa. St. 535 (1 Atl. 523); *Myers v. Council Bluffs Ins. Co.*, 72 Iowa, 176 (33 N. W. 453). It is the duty of an insurance company, pending the adjustment of a loss, under its policy, to act toward the claimant in good faith, and if it is dissatisfied in any way with the proof furnished, it ought to make known to the assured the specific nature of its objections, so that he may have an opportunity to make the necessary correction before it is too late. Good faith and common honesty demand as much, and the law is not satisfied with anything less. Hence we dismiss without further comment any objections to the sufficiency of the proof as made, other than that it "furnishes no proof as to the value of the house except the man's mere statement that it is worth so much." This objection is quite indefinite in its meaning, as the policy provides that the value shall be shown both by the certificate of a magistrate or notary public and of a builder, and whether it was intended to be understood that the proof was defective because it did not have the notary's or the builder's certificate is not made clear. The plaintiff, however, evidently in good faith, understood it to refer to the certificate of the notary, and immediately supplied what he supposed to be the defect pointed out and so advised the company. It thereafter made no objection on that account, but returned the proof with the simple statement that it was "declined and objected to." Under these circumstances it cannot be heard to say now that the proof is defective because it did not have a builder's certificate as to the value of the property. If it desired to object on that account

it should have said so, and not used language calculated to mislead and confuse.

2. But it is said that the notary's certificate as actually furnished is insufficient because the facts show that the officer making it was not the notary nearest to the fire. But this objection also comes too late. It should have been made at the time the proof was returned, and plaintiff thus given an opportunity to procure the certificate of the proper officer, if that was insisted upon by the defendant company. In our opinion, the objection to the proof of loss that the certificate of the nearest notary and of a builder did not accompany it is not available to the defendant at this time, and the proof as made must be held and deemed a sufficient compliance with the policy in that respect. This being so, any error of the court either in the admission of evidence or in instructing the jury upon the matter of the waiver of a proof of loss becomes entirely immaterial, and need not be further considered.

3. Upon the other question it is admitted that unless the stipulation in the policy in regard to the effect of the erection of adjoining buildings was waived by the defendant, the construction of the car barn rendered the policy void, and the plaintiff cannot recover. The question of waiver must be determined from the testimony of the plaintiff and the agent Irle. The plaintiff testified that when he paid the last installment of the premium he told Irle the car barn had been built, and asked him how much it would add to the cost of his insurance; that Irle said seventeen dollars, but afterwards said it would be about twenty-two dollars, and at another time thirty-five dollars; that he told Irle he wanted to find out about it, but didn't have the money to pay just at that time, and Irle replied "All right, I will let you know," but the witness never heard of the matter again. Irle says that he

saw the plaintiff in September, and had a conversation with him about the car barn, during which the plaintiff asked him if it would make any difference in his insurance; that he told him it would increase the cost of the insurance as well as the hazard, but he could not tell how much, but would write to the company and find out; that he did write to the company for information in regard to the matter, and upon receiving its answer wrote to the plaintiff to come to his office and he would tell him what the additional cost would be. In response to this notice plaintiff came to the office, and was informed by witness of the amount of the increased rate on account of the barn, but thought it too much, and for that reason did not pay it at the time, but said he would see about it. In a week or so afterwards the witness again met the plaintiff on the street, and told him he had not paid the additional premium, and that it must be paid or he had no insurance, and plaintiff said that other agents had told him that a policy when once written remained in force until it expired, and that he would let it go that way. Upon cross examination the witness said that he did not cancel the policy for failure to pay the additional premium as he ought to have done, because he wanted to keep the insurance, and wanted plaintiff to pay the amount due. From this testimony it appears that Irle not only had notice himself of the existence of the car barn before he received and accepted the full premium on the policy in suit, but that he also notified the company at the home office of that fact, and obtained from it a statement of the amount of additional premium made necessary by such structure. When the company, with knowledge of the violation of the provisions of the policy as thus communicated by Irle, retained the premium, and allowed the policy to remain uncanceled, it estopped itself from claiming a forfeiture on account of the barn, although its consent for its erection was not

given in writing. The condition of the policy in this regard could be waived or modified by the defendant, and such waiver or modification could be made by parol, although the policy itself provided that it should be in writing: *Miner v. Phoenix Ins. Co.*, 27 Wis. 693 (9 Am. Rep. 479); *Webster v. Phoenix Ins. Co.*, 36 Wis. 67 (17 Am. Rep. 479); *Viele v. Germania Ins. Co.*, 26 Iowa, 9 (96 Am. Dec. 83). So that whether Irle's knowledge of the erection of the car barn would be binding upon the defendant or not is immaterial, because the company itself, after being advised of the breach, retained the premium, and took no steps whatever toward the cancellation of the policy, and therefore waived the forfeiture: *Hibernia Ins. Co. v. Malevinsky*, 6 Tex. Civ. App. 81 (24 S. W. 804); *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285 (8 S. W. 453). Finding no error in the record, the judgment of the court below is affirmed.

AFFIRMED.

Argued October 27; decided November 30, 1896.

STATE v. STOCKMAN.

(46 Pac. 851.)

WAREHOUSE—CODE, §§ 4201-4207.—A warehouse, within the meaning of the provisions of sections 4201-4207, Hill's Code, is a place where any of the commodities enumerated in such sections are received on storage for the owner by some one engaged in the general business of receiving such goods in store for profit or compensation; therefore, to sustain a conviction under this "Warehouse Act," as it is called, it must be shown that some of the articles named in the statute were placed on storage in some building that was a "warehouse" under that act

From Marion: GEO. H. BURNETT, Judge.

John R. Stockman was convicted of violating one of the provisions of the legislative act set forth in sections 4201-4207 of Hill's Code, relating to the conduct and management of public warehouses.

REVERSED.

30	36
40	615
80	86
41	284
30	36
148	10

For appellant there was a brief over the names of *Messrs. Martin L. Pipes, Starr, Thomas & Chamberlain*, and *Tilmon Ford*, with an oral argument by *Mr. Pipes*.

For the State there was a brief over the signatures of *Messrs. Cicero M. Idleman*, Attorney-General, and *Samuel Hayden*, District Attorney, with oral arguments by *Messrs. Idleman* and *John M. Somers*.

Opinion by MR. JUSTICE BEAN.

The defendant, John R. Stockman, was convicted of a violation of section 4 of the act of 1885, commonly known as the "Warehouse Act," being section 4204 of Hill's Code, by shipping wheat stored in a warehouse of which he was the manager, without the written assent of the holder of the receipt therefor. The facts are that at the time of the commission of the alleged crime the defendant was the manager of the Red Crown Roller Mills, a corporation owning and operating a flouring mill in Albany, Oregon, and engaged in the business of manufacturing flour and other mill products for sale. A part of the mill building was used for the storage of wheat belonging to the company, and such as it might receive from the neighboring farmers. The wheat so stored was all mixed in one common mass, from which the company drew from day to day for the purpose of its business. In September, 1894, one E. D. Barrett delivered to it some 2,198 bushels of wheat, for which a receipt in the following form was issued to him:

"Red Crown Mills.

No. 1078.

Albany, Oregon, Sept. 18, 1894.

Received of E. D. Barrett, by self, two thousand one hundred ninety-eight 15-60 bushel No. 1 merchantable

wheat, subject to sacks and storage .08 cents per bushel, if withdrawn from mill.

RED CROWN ROLLER MILLS.

2198 15-60 Bu.

Lyons."

Immediately upon the receipt of the wheat, it was, with the knowledge and consent of Barrett, mixed and mingled with the other wheat on hand at the time, and was subsequently manufactured into flour by the mill company, and sold for its own use and benefit. No storage was paid or demand made for the wheat until after the failure of the company in March, 1895, when Barrett demanded the then market value thereof, which being refused, he tendered the storage, and demanded a return of the wheat, and obtaining neither, commenced this prosecution.

The indictment charges that the defendant, as the manager of a warehouse for the storage of grain, received for storage therein the wheat in question, issued a receipt therefor, and afterwards sold, shipped, transferred, and removed the same from such warehouse, and beyond his control, without the written assent of the holder of the receipt. In order to sustain this charge it was incumbent upon the State to prove that the wheat in question was in fact placed in a warehouse, within the meaning of that term as used in the statute, and, in addition thereto, that it was placed therein on storage. A failure of proof in either particular would necessarily be fatal to the prosecution. Upon its face the receipt issued to Barrett affords no solution of either of these questions, for it is silent as to whether the building was in fact a warehouse, and as to whether the wheat was received on storage, or for some other purpose; and therefore resort could be had to parol evidence to ascertain the true character of the business in which the mill company was engaged, as well

as the terms on which the wheat was received: *Lyon v. Lenon*, 106 Ind. 567 (7 N. E. 311). Upon the trial evidence was given and offered tending to show, and from which the jury could have found, that the mill company did not receive grain for storage or safe keeping, but that, according to its usual course of business, known to its customers, and particularly to Barrett, all wheat received by it was mixed with and became a part of the consumable stock of the mill, and was manufactured into flour and other mill products, and sold and disposed of by the mill company in the usual course of business, and that it satisfied its obligation to the depositors by paying them the market price when demanded, or by returning a like quantity and quality of other wheat. In the former case no storage was charged or paid, but in the latter a charge of eight cents a bushel was made for sacks and storage, and this accounts for the provision in the receipt to Barrett concerning the payment of storage if the wheat should be withdrawn from the mill. Assuming these facts to be true, as we must for the purposes of this appeal, the question of law is presented as to whether the transaction comes within the provisions of the act of 1885. And, as its solution involves the merits of the entire theory upon which the cause was tried in the court below, we shall proceed to examine it without encumbering the opinion with a statement of the various ways in which the question was raised during the progress of the trial. It is conceded by counsel for the State, as we understand them, that if, assuming the facts stated to be true, the corporation of which defendant was the manager was not engaged in the warehouse business, or if the wheat was not received on storage, within the meaning of the statute, the judgment from which this appeal was taken is erroneous, and should be reversed.

The statute in question (Laws 1885, p. 61; 2 Hill's

Chapter 12, 1897-1898 is entitled "An act to regulate warehousemen, warehouse commission men and other persons and to define the effect of warehouse receipts," and makes it the duty of every person owning or operating "any warehouse, commission house, forwarding house, or other place where grain, flour, pork, beef, wool, or other produce or commodity is stored," to deliver to the owner thereof a warehouse receipt, which "shall bear the date of its issuance and shall state from whom received, the number of sacks, if sacked, the number of barrels or pounds, the condition or quality of the same, and the terms and conditions upon which it is stored"; prohibits the issuance of fraudulent receipts, or for a commodity not actually in store at the time of issuing such receipt; prohibits the bailee from mixing commodities of different qualities or grades; provides that no person operating "any warehouse * * * or other place of storage" shall sell, encumber, ship, transfer, or remove beyond his custody or control, any grain or other produce for which a receipt has been given by him, without the written consent of the holder of the receipt; makes all checks or receipts given by any person operating "any warehouse * * * or other place of storage" for any grain or other commodity "stored or deposited," and all bills of lading and transportation receipts of any kind, negotiable; provides that the same may be transferred by indorsement, which shall be deemed a valid transfer of the commodity represented thereby; that on the presentation of the receipt given by any person operating "any warehouse * * * or other place of storage" for grain or other produce, and payment of all the charges due thereon, the owner shall be entitled to the immediate possession of the "commodity named in the receipt"; that it shall be the duty of the warehouseman or bailee to deliver the same to him; and the violation of any provision of the act is

thereby made a penal offense, punishable by fine or imprisonment, or both.

From this summary it is apparent that the statute, as its title and contents clearly indicate, is designed to cover the special business of warehousemen, wharfingers, commission men, and other bailees who are engaged in receiving and storing the goods of others as a business. Its principal object is to make warehouse receipts negotiable, and to protect the rights of the holders thereof, by requiring the warehouseman or bailee to keep constantly on hand the specific goods stored, or a sufficient portion of the bulk of which they become a part, to satisfy his outstanding receipts. In short, it was designed to compel a warehouseman or other like bailee, under the penalties of a criminal prosecution, to live up to and abide by the contract of bailment. But the evil sought to be remedied by this legislation and the remedy sought to be applied alike show that it never was within the legislative mind that it should apply to a case where the bailee has the right, under the contract, express or implied, to sell or use the goods committed to his care. In such case, in the very nature of things, there can be no storage or bailment; but the transaction is, in essence, a sale of the commodity, and an extension of personal credit to the bailee. There is an inherent difference recognized by all the authorities between a bailment and a sale. In the one case the property remains in the depositor, and the bailee is but the custodian of the thing, with no right to use or dispose of it in any way; while in the other he may use it as his own, the depositor relying upon his personal credit for its value either in money or kind. A warehouse, therefore, within the meaning of this statute, is a place where any of the commodities enumerated therein is received on storage for the owner, by some person or corporation engaged in the general business of receiving such goods in store for com-

pensation or profit: *Bucher v. Commonwealth*, 103 Pa. St. 528; *Fishback v. Van Dusen*, 33 Minn. 111 (22 N. W. 244); *State v. Bryant*, 63 Md. 66.

Under the rule in this state, wheat stored with a warehouseman does not cease to be a bailment, within the meaning of this act, because it is by the consent of the depositor mixed with other wheat of like grade and quality: *McBee v. Caesar*, 15 Or. 62 (13 Pac. 652). But when it is delivered and received under an agreement, express or implied from the course of dealing, that the person to whom it is delivered may use it as a part of his consumable stock, and fulfill his obligation to the owner by either paying its market value when demanded or returning an equal amount of other wheat of like grade and quality, the transaction is not a bailment or storage, within the meaning of the statute, and the depositor cannot be convicted of a crime for doing that which he is permitted to do by the very terms of his contract: *Lyon v. Lenon*, 106 Ind. 567 (7 N. E. 311); *McCabe v. McKinstry*, 5 Dillon, 509 (Fed. Cas. No. 8, 667); *Andrews v. Richmond*, 34 Hun. 20; *Johnston v. Browne*, 37 Iowa, 200; *Nelson v. Brown*, 44 Iowa, 455. Now, as already suggested, there was evidence in this case tending to show (1) that the company of which the defendant was the manager was not engaged in the business of receiving grain on storage for the owner, and so was not a warehouse-keeper within the meaning of the statute; and (2) that, if it was keeping a warehouse for the storage of grain, the Barrett wheat was not so received. The case, therefore, should have been submitted to the jury with a direction that they could not convict unless they were satisfied from the evidence that the place where the grain was deposited was in fact a warehouse for the storage of grain, and that it was received there on storage, and not on an agreement, express or implied, that the mill company might use it in

the course of its business. And because these questions were not so submitted to the jury, the case must be reversed and a new trial ordered.

REVERSED.

JUSTICE WOLVERTON took no part in this decision.

Argued April 14; decided October 19, 1896; rehearing denied.

CRAIG v. CALIFORNIA VINEYARD CO.

(46 Pac. 421.)

1. **RIGHT OF COURT TO REFER CAUSE—EXAMINATION OF ACCOUNTS—**CODE, §§ 397, 815.—The Circuit Court of Multnomah County, if a case before it involves the examination of long and complicated accounts, may, without the consent of the parties, refer it to a referee; and, where one branch of a case requires twenty-six pages of account for its statement, the reference is justified.
2. **FRAUDULENT TRANSFERS—RIGHTS OF CREDITORS.**—Upon a full review of the evidence in this case it is established that there was such a fraudulent application of the assets of the California Vineyard Co., to the payment of the private debts of James Wolfsohn due the Merchants' National Bank of Portland, Oregon, as to render void, so far as attaching creditors are concerned, the bill of sale to and the judgment obtained by said bank against said vineyard company.
3. **DIVERSION OF ASSETS—CREDITOR'S BILL.**—Where corporate assets have been diverted to the payment of private debts, equity will pursue the assets so diverted, and apply them, if recovered, to the payment of the corporate debts, according to their respective priorities.
4. **ATTACHMENT VOID FOR FRAUD.**—Where an attachment action is intentionally brought on a false claim, or on a claim that is known to be partly false, the whole proceeding will be held void as against subsequent attaching creditors; though this may not be true where the just and false are inadvertently blended in one claim.
5. **RIGHT TO REPLEVIN FOR FRAUD OF VENDEE.**—Where an insolvent orders large quantities of goods in anticipation of failure, for the purpose of surrendering them to a preferred creditor, and such goods are thereafter fraudulently attached by such creditor, the vendors of the property thus obtained may rescind the sales, and bring replevin to recover possession of their respective goods.

From Multnomah: LOYAL B. STEARNS, Judge.

This is a suit in equity by sundry creditors of the California Vineyard Company, of Portland, to set aside certain conveyances and attachments as fraudulent, and to determine the distribution of the assets that might be discovered and saved by a receiver. Chas. A. Malarkey, as receiver, sold all the property of the company that could be found, and paid the proceeds into the registry of the court. There was a decree as prayed for, from which the Merchants' National Bank, Julius Loewenberg and Penumbra Kelly, sheriff, appeal.

AFFIRMED.

For appellants there was a brief over the names of *Whalley & Muir*, and *Gearin, Silvestone, Murphy & Brodie*, with oral arguments by Messrs. *John W. Whalley* and *John M. Gearin*.

For respondents there was a brief over the names of *Cox, Cotton, Teal & Minor, Raphael Citron, Dolph, Mallory & Simon, Williams, Wood & Linthicum, Robert G. Morrow*, and *J. M. Bower*, with oral arguments by Messrs. *Joseph N. Teal, Joseph Simon* and *J. M. Bower*.

Opinion by MR. CHIEF JUSTICE MOORE.

This is a suit by C. W. Craig and others to set aside a bill of sale executed by and a judgment rendered against the California Vineyard Company, a corporation, to enjoin the sale of its property under an execution issued upon said judgment, and for the appointment of a receiver. The material facts are that about July 1, 1891, the defendant James Wolfsohn, under the name of the California Vineyard Company, opened a liquor store at Portland, but, having no means wherewith to carry on the business, the defendant the Merchants' National Bank, of which the defendant Julius Loewenberg was president, advanced money there-

for, which on October 4, 1892, amounted to and was evidenced by Wolfsohn's promissory note of \$20,000.00, and Loewenberg also loaned him \$2,250.00. Prior to January 1, 1893, one Louis Kuhn loaned him \$10,610.85 more, and on that day the California Vineyard Company, having been duly incorporated, commenced business as a wholesale dealer in wines and liquors, with a capital stock of \$100,000.00, divided into 1,000 shares of the par value of \$100.00 each, of which Wolfsohn subscribed for 249, Kuhn 250, and one W. L. Boise one share. When the company incorporated, Wolfsohn, having prepared a trial balance showing his assets to be \$31,691.80, and liabilities \$17,691.80, transferred to the corporation all the goods and property of his former business, subject to the payment of his debts for such goods; and Kuhn, from the amount so loaned by him, was credited with \$7,000.00 on account of his subscription to the capital stock, and Wolfsohn obtained credit on his subscription thereto for a like amount on account of the said transfer to the corporation. On February 28, 1893, Louis Kuhn died testate, and Louise Kuhn, his widow, having been appointed executrix of his last will and testament, duly qualified as such, and entered upon the discharge of her trust. On February 28, 1893, the California Vineyard Company executed to the Merchants' National Bank its promissory note for \$25,000.00, payable in ninety days, with interest after maturity, and on March 1 of that year obtained a credit therefor of \$24,000.00, of which \$14,563.11 was applied in discharging overdrafts. On May 23, 1893, Wolfsohn having paid from the assets of the corporation \$250.00 on account of the money loaned by Kuhn, executed to Louis Kuhn his three promissory notes amounting to \$10,360.85, payable in six, nine, and twelve months; and in consideration therefor the executrix assigned to him the shares of stock of said corporation subscribed by Kuhn, but held the

certificates thereof as collateral security for the payment of said notes. The Merchants' National Bank, on June 28, 1893, loaned to the corporation \$5,000.00, taking its note therefor, and on September 13 of that year this note and the one for \$25,000.00 were taken up, and another for \$30,000.00 was executed by the corporation in lieu thereof. At the same time, upon the advice and request of Loewenberg, it executed the following notes: To the Merchants' National Bank, \$20,000.00, on account of Wolfsohn's said note of October 4, 1892; to Loewenberg, \$2,250.00, on account of money loaned by him to Wolfsohn; and to Louise Kuhn, \$10,360.85, on account of Wolfsohn's notes to her, each of which was made payable on demand, with eight per cent. interest from that date, but the note to Mrs. Kuhn was deposited with Loewenberg, to prevent her from maintaining an action thereon and attaching the property of the corporation; and as a consideration for the execution of said notes Wolfsohn gave the corporation his promissory note for \$32,610.85, the amount of the notes so executed by it. On February 12, 1894, the note of \$20,000.00 was taken up, and notes of \$8,000.00 and \$12,000.00 were executed by the corporation in lieu thereof, the interest thereon to that date amounting to \$666.65 having been fully paid.

On March 12, 1894, while being hard pressed by its creditors, and unable to secure any further advances from the bank, the corporation instituted a branch house at Tacoma, Wash., and ordered from eastern dealers and shipped from its Portland store to the branch house goods of the value of \$14,503.00. On February 22, 1894, the corporation paid \$320.00 interest on the \$12,000.00 note to June 12 of that year, and on May 24, \$120.00 interest on the \$8,000.00 note, making \$1,106.65 paid out of the assets of the corporation to the bank on account of Wolfsohn's private debt, and on the date last mentioned paid

Loewenberg \$113.50 more, as interest on the \$2,250 note from September 13, 1893, to May 1, 1894. It also paid Mrs. Kuhn, as interest on her notes for \$10,360.85, eight monthly installments of \$69.17 each, amounting to \$552.56, and, upon Loewenberg's advice and at his request, it paid money and delivered invoices of goods to Mrs. Kuhn in payment of Wolfsohn's debt, amounting to \$7,262.83, thereby taking up two of his notes, and having a credit indorsed in the third, and making the total amount of the assets of the corporation thus diverted \$9,035.54. On May 24, 1894, the corporation discounted to the said bank certain notes executed to it, amounting to \$907.22, to which Wolfsohn added his note for \$32,610.85, and thus secured an apparent cash credit for the corporation of \$33,518.07 upon the books of the bank, against which it drew a check in favor of the bank for \$20,120.00 in payment of its said notes for \$12,000.00 and \$8,000.00, and another for \$2,800.00 which was credited on the \$30,000 note, the balance of the credit having been applied on an overdraft of the corporation. On May 31, 1894, it executed a bill of sale of its stock of goods at Tacoma to the bank, whose agent took possession of the same, and filed the bill of sale for record; and, in consideration of the transfer, the bank paid \$592.25 on account of some expenses in the management of the branch house, and endorsed a credit of \$10,000.00 on said note for \$30,000.00, and on the next day commenced an action in the Circuit Court of Multnomah County against the California Vineyard Company to recover \$17,200.00 as the balance due thereon, and for \$1,750.00 attorneys' fees; and, having duly sued out a writ of attachment, the defendant Penumbra Kelly, as sheriff of said county, in pursuance thereof, attached all the goods of the corporation in his store at Portland. Thereafter actions were commenced in said court against the California Vineyard

Defendants by the plaintiffs in this suit as follows: By C. W. ~~Travis~~ ^{Travis} for \$1,351.00; Iler & Co., \$2,087.64; Eisen Vineyard Co., \$1,285.93; Wm. Wolf & Co., \$2,664.95; ~~Seidenman~~ ^{Seidenman} Lachman & Co., \$566.70; S. Lachman & Co., \$1,087.00; H. H. Veuve, \$776.03; C. H. Arnold, \$765.78; M. de Grousseau, \$1,420.70; and L. Jacobi, \$986.00; and, having sued out writs of attachment, the goods of the corporation at Portland were also attached in these actions. The Merchants' National Bank obtained judgment by default for the amount demanded, and an order for the sale of the attached property; and, an execution being issued thereon, the sheriff advertised the same for sale on June 25, 1894, on which day the plaintiffs herein, having obtained judgments in their respective actions, and orders for the sale of said goods, and executions issued thereon having been returned nulla bona, commenced this suit, on behalf of themselves and all other creditors of the California Vineyard Company who might desire to join with them and pay their pro rata share of the expenses thereof, alleging that the defendant James Wolfsohn, manager of the company, and Julius Loewenberg, president of the Merchants' National Bank, entered into a conspiracy to hinder, delay, and defraud the creditors of said corporation, in pursuance of which the bank unlawfully absorbed all its assets; that the California Vineyard Company at the time said bill of sale was executed was, and for a long time prior thereto had been, hopelessly insolvent, which fact was well known by Wolfsohn, Loewenberg, and the other officers of the bank, and pray for the relief hereinbefore stated.

The court granted a temporary injunction, restraining the sheriff from selling said goods, and appointed a receiver, who took possession of the attached property, and also of the stock of goods which had been shipped to Portland from Tacoma, and, by order of the court, sold

most of them. The issues having been joined, the cause was, without the written consent of the parties, referred to John Catlin, Esq., with directions to take and report the evidence with his findings of fact and law therefrom. Thereafter actions were, by consent of the court, brought against the receiver for the recovery of certain portions of the property so held by him, to wit: By Cook & Burnheim Co., to recover the possession of fifteen barrels of whiskey, valued at \$1,419.58; I. de Turk, three barrels and six half barrels of brandy, of the value of \$579.45; Kohler & Frohling, certain wines valued at \$1,571.58; and A. Dausseau, three bales of corks of the value of \$357.00, and the several issues embraced therein submitted for determination in this suit by stipulation of the parties. The referee having found for the plaintiffs in the replevin actions, and for the plaintiffs in this suit, the court in the main affirmed his report, and decreed: (1) that the judgment rendered in favor of, and the bill of sale executed to, the Merchants' National Bank, so far as the plaintiffs are concerned, be set aside; (2) that there be paid to the plaintiffs in the replevin actions, from the money arising from the sale of the goods and deposited with the clerk by the receiver, the following amounts, to wit: To the Cook & Burnheim Co., \$1,050.00; I. de Turk, \$490.00; Kohler & Frohling, \$806.03, and the firm last named was also awarded the possession of two barrels of Zinfandel, two barrels of Burgundy, and one barrel of Reisling wine; and A. Dausseau was awarded the possession of three bales of corks, the goods so awarded to these parties not having been sold by the receiver; (3) that the remainder of the proceeds of such sale be applied to the satisfaction of the several judgments obtained by the plaintiffs in this suit, but, if insufficient for that purpose, then to be applied thereon pro rata; (4) that the California Vineyard Company recover of the defendant Julius Loewenberg the sum of \$363.50;

(5) that the injunction be made perpetual; (6) that, should any moneys remain after the application of the proceeds of such sale as hereinbefore decreed, the same to be paid to the Merchants' National Bank; (7) and that the plaintiffs recover of the defendants the Merchants' National Bank, Julius Loewenberg, and James Wolfsohn, their costs and disbursements, other than the expenses of the receiver, from which decree the defendants the Merchants' National Bank, Julius Loewenberg, and Penumbra Kelly appeal.

1. It is contended by counsel for the defendants that this suit does not involve the examination of long or complicated accounts, and, the parties not having consented thereto, in writing, the court erred in referring the cause, and that the decree should therefore be reversed, and the cause remanded for trial by the court. The power of the Circuit Court of Multnomah County to refer an issue of fact in a suit in equity to a referee for trial is limited to causes involving the examination of long and complicated accounts: Section 397, Hill's Code, as amended by an act of the legislative assembly, approved February 20, 1893 (Laws 1893, p. 26). The plaintiffs having alleged in their amended complaint that the indebtedness claimed by the Merchants' National Bank against the California Vineyard Company was the personal debt of the defendant James Wolfsohn, prayed that the bank, its officers and agents be compelled to disclose the true character of its pretended claim against said corporation, in response to which the cashier of the bank prepared and submitted to the plaintiffs a statement of its account, forming the consideration for its note of \$30,000.00, which is printed in and occupies twenty-six pages of the appellants' brief. The court evidently entertained the opinion that this account was sufficiently long and complicated to bring the suit within the accepted cases in which a reference is

authorized by statute, and we see no reason to doubt the correctness of its action in referring the cause under the circumstances. Section 815, Hill's Code, as amended by an act of the legislative assembly, approved February 20, 1893 (Laws 1893, p. 26). deprives the trial courts of the power they possessed under the former act to refer an issue of fact in a suit in equity to a referee, with direction to report the conclusions of fact and law as found by him. The manifest object of this amendment is to compel a trial by the court of the issues of fact and law in equity cases, to the end that it may observe and note the appearance of the witnesses, and their manner of testifying, thereby materially aiding the court in weighing the evidence, and reaching a correct conclusion therefrom; and when it becomes necessary to refer an issue of fact to a referee in an equity case, it is incumbent upon the court to reach its conclusions of fact and law from the evidence reported, uninfluenced by any opinion of the referee thereon. The evidence is all before us, and the issues are here for trial *de novo*, so that there can be no good reason for reversing the decree, and remanding the cause for trial by the court without a reference, presuming, as we must, that the trial court reviewed the evidence, and reached its conclusions therefrom; but, as it did not see the witnesses, it could not note their manner of testifying, and hence had no advantages in reaching its conclusions superior to this court, and this being so a careful examination of the evidence becomes necessary.

2. The decree complained of proceeds upon the theory that the defendants Wolfsohn and Loewenberg were guilty of such acts of actual fraud in their dealings with the California Vineyard Company and its assets as to render void, as to the plaintiffs, the bill of sale executed to and the judgment obtained by the Merchants' National Bank. After carefully reviewing the evidence relied upon,

we think the allegations of fraud have been established. It appears that Loewenberg conceived the idea that the California Vineyard Company should assume and pay Wolfsohn's debts, and upon his request the corporation, on September 13, 1893, executed its notes for that purpose, and the bank thereafter collected interest thereon until May 22, 1894, when they were surrendered, and Wolfsohn's note given in lieu thereof; but this exchange of the evidence of indebtedness did not place the corporation in statu quo, because the amount of interest collected on Wolfsohn's debt was not credited upon the \$30,000.00 which was due from the California Vineyard Company to the Merchants' National Bank. Loewenberg was a brother-in-law of Louis Kuhn, and, upon the death of the latter, his widow, being anxious to ascertain the condition of her deceased husband's estate, applied to and obtained from Wolfsohn a statement of the assets and liabilities of the company, and Loewenberg, learning she had obtained such information, became offended thereat, and told her if the condition of the corporation became known its creditors would close out the business, and neither she nor the bank would obtain anything; but that if the management of her business were intrusted to him, he would be able to secure the payment of both claims. Mrs. Kuhn testifies that Loewenberg promised to look after her interests, and to see that her claim was protected; but he, testifying upon this subject, says: "All I would say was, I would look out for her interests as I had my own. And I did better, as she got, I believe, some \$7,800.00 worth of stuff, and I haven't anything for my indebtedness; he owes me \$2,250.00. I am a creditor of the California Vineyard Company to that amount." The bank would probably not be bound by Loewenberg's management of Mrs. Kuhn's claim against Wolfsohn, and the fact is noted only to show Loewenberg's method of securing the payment

of Wolfsohn's debts at the expense of the California Vineyard Company. In this connection another circumstance may be cited that tends to show the relation existing between Wolfsohn and Loewenberg. About two weeks before the goods were attached, Wolfsohn sent from the store of the corporation to Loewenberg's house a quantity of goods, which the witness H. S. Tulley, an employe in the store, says consisted mostly of imported goods, ales and French wines; and J. A. Love, the drayman who delivered the same, testifies that he took a receipt for them in the delivery book of the corporation, and that they consisted of two barrels of what he supposed to be ginger ale, and ten or twelve cases of mineral water. The delivery book of the corporation being offered in evidence discloses that three pages had been torn therefrom containing the dates from April 9 to May 14, 1894. Wolfsohn testifies that the value of the goods so delivered was about \$200.00 or \$300.00, more or less, and that he was to receive a credit therefor on his note to Loewenberg of \$2,250.00, but the books of the corporation contain no entry of any sales of goods to Loewenberg between these dates.

Wolfsohn, on January 1, 1893, prepared a trial balance, showing that the assets of the corporation exceeded its liabilities by \$14,000.00, but furnished to the commercial agencies of Bradstreet, Pickens, Fulton & Co., and R. G. Dun & Co., what purported to be copies thereof, in which the excess was falsely represented to be \$50,000.00. From January 1 to June 1, 1893, the California Vineyard Company purchased goods of the value of \$10,339.96, while for the same period in 1894 the purchases amounted to \$19,975.83, nearly all which were made during the months of March, April, and May. About March 29, 1894, Charles M. Morgan, representing Bradstreet's Commercial Agency, called upon Loewenberg, informing him that the

California Vineyard Company had been giving large orders for goods to eastern houses, thereby creating suspicion, and asked him if he thought the orders were given with any intention of securing a large stock of goods with a view to a failure by the company, to which Loewenberg replied, "that he believed Wolfsohn was honest; that he would not gather a stock of goods for the purpose of having it on hand that he might fail; that he did not know how much the company owed; that they owed the bank some, but he would not care to state how much, and that he believed the company was good and responsible." At the time this representation was made to the agent, the company owed about \$50,000.00, while its assets were valued at about \$37,000.00. Loewenberg then knew the officers of the bank intended to take a bill of sale of the Tacoma stock, and in all probability knew the goods in Portland were to be attached, for he testifies, "that the cashier and directors, about two weeks previous to the attachment, insisted upon some action being taken against Wolfsohn and the California Vineyard Company; that the first step taken was to purchase all the bills receivable; that the bill of sale was made because Wolfsohn was pressed by the bank for payment or security, and he agreed to give the bill of sale of the Tacoma stock, which he did; that the purchases of the bills and the stock were made one right after the other, and after this was done the bank attached." The bills receivable, to which Loewenberg referred, were discounted by the bank May 22, 1894, and it is evident that this was the date at which the bank adopted the course it pursued, although the bill of sale is dated May 31, 1894. Loewenberg knew the company had been losing money, that the bank would make no further advances to it, that it was pressed by other creditors for payment of their demands, and he must also have known it was insolvent, in view of which it seems difficult

to explain his statement to Morgan, "that he believed the company was good and responsible," upon any other hypothesis than that it was made to delay other creditors of the company until the bank could absorb all its property. But it may be claimed, and with good reason, that Loewenberg owed no duty to Morgan, or to the commercial agency which he represented, that compelled him to disclose the financial condition of the company, in view of which fact he might have declined, instead of expressing a false opinion thereon. There are in the record many other facts and circumstances tending to show a conspiracy existing between Wolfsohn and Loewenberg, but we deem the illustrations given sufficient to show that Loewenberg intended to absorb the assets of the company in the payment of its own and Wolfsohn's debts to the bank, for, being willing to apply its property to the payment of Wolfsohn's indebtedness to himself and Mrs. Kuhn, it is not assuming too much to say he was also willing and intended to make a similar disposition of the assets of the company to the payment of Wolfsohn's debt to the bank, and, being its president, the latter should be bound by his act.

The bank collected from the corporation \$1,106.65 as interest on Wolfsohn's private debts, and to this extent, at least, its other creditors were injured. It is true, the bank, prior to the incorporation of the company, loaned Wolfsohn \$20,000.00, which presumably went into his business, and helped to swell the assets he transferred to the company when it was incorporated; but the agents of the bank knew of the incorporation, and thereafter loaned to it \$30,000.00, thereby recognizing its legal existence. If the bank, knowing Wolfsohn intended to incorporate a company and to transfer to it the assets of his business, made no objections thereto, such acquiescence ought to be construed as an admission of its ratification of the

course adopted, and that it relied upon Wolfsohn personally for the payment of his debt, and upon its ability to satisfy any judgment it might obtain against him by a sale of the stock in the corporation received by him for the property so transferred. It must be conceded, however, that if the company had been incorporated by Wolfsohn to defraud the bank, the latter would not have been bound by the transfer of his property, and could, in equity, have followed it and applied the proceeds to the satisfaction of its debt: *Bennett v. Minott*, 28 Or. 339 (44 Pac. 288); but the friendly relations existing between Wolfsohn and Loewenberg precludes any inference of fraud, so far as the bank is concerned, from such transfer. The business conducted by Wolfsohn being under his sole control when the bank loaned him the \$20,000.00, no equitable trust attached to his property, and, the company not having been incorporated for the purpose of hindering, delaying, or defrauding the bank, it had no equitable interest in the assets of the corporation by reason of the transfer of Wolfsohn's property, and its remedy for the collection of the \$20,000.00 and interest thereon was against Wolfsohn's individual property, including his stock in the corporation received as an equivalent for the property so transferred.

The plaintiffs in this suit do not invoke the doctrine of an equitable trust attaching to the property of the corporation by reason of its insolvency, but maintain that in consequence of the fraud practiced by Wolfsohn and Loewenberg the bill of sale and transfer of the stock of goods at Tacoma are fraudulent as to them. The bill of sale and attachment were, in our judgment, parts of one scheme to absorb all the assets of the California Vineyard Company, and, the attachment being fraudulent, it follows that the bill of sale, which was a part of the same transaction, was equally so, and there was no error in

setting it aside, and applying the proceeds arising from the sale of the goods thereby transferred to the satisfaction of the judgments obtained by the plaintiffs.

3. The payment to the bank of interest on Wolfsohn's private debt was an application of the property of the corporation which inured to the benefit of Wolfsohn, its stockholder, director, and manager, and, the corporation being insolvent at the time such interest was collected, and the officers of the bank having knowledge thereof, a court of equity will follow the company's assets so diverted, and, upon their recovery, apply them to the payment of its creditors, according to their respective priorities: Thompson on Corporations, § 6527.

4. It must be admitted that the bank had a bona fide claim of \$30,000.00 against the California Vineyard Company, but it intentionally omitted to credit a payment thereon of \$1,106.65, the amount collected on Wolfsohn's debt, caused the property of the company to be attached, and took judgment for the amount demanded, including the false claim of \$1,106.65, and obtained an order for the sale of the attached goods, and the question of law now involved is whether such attachment and judgment are fraudulent as to the creditors of the company who subsequently attached the same goods. In *Fairfield v. Baldwin*, 12 Pick. 388, it is held that if property be attached on a writ founded on two demands, one of which is honest and the other fraudulent, and a judgment is rendered for the plaintiff upon both demands, the attachment is wholly void as against a subsequent attaching creditor. In *Page v. Jewett*, 46 N. H. 441, it is held that if an attaching creditor take judgment for a claim larger than is due, and seek to collect the whole thereof, this would be such a fraud upon the rights of subsequent attaching creditors as to defeat the prior attachment, unless it affirmatively appear that the error embraced in the judgment was the

result of mere accident or mistake. And in Connecticut an attachment predicated upon a claim willfully false in part is treated, so far as the rights of subsequent attaching creditors are concerned, as wholly fraudulent; but where a false claim, through accident or mistake, is inadvertently blended with a just demand, the attachment will be treated as security for the latter amount: *Ayres v. Husted*, 15 Conn. 503. The Merchants' National Bank having intentionally blended a false claim with a just demand against the California Vineyard Company, upon which it caused the property of the latter to be attached, and recovered judgment therefor, which it was seeking to enforce for the whole amount, renders the attachment obtained by it void as to the subsequent attaching creditors of the company, who are entitled to the fund arising from the sale of the property so attached by them in the order of the lien of their respective attachments, but the plaintiffs joined in a common suit for their mutual benefit, thus pooling their claims, in view of which we find no error in the distribution of the fund pro rata among them.

5. In the replevin actions it appears that Wolfsohn, as manager of the California Vineyard Company, anticipating its failure, ordered from the plaintiffs in the respective actions large quantities of goods, so that it might be able to surrender them to its preferred creditors. The goods, having arrived and been delivered to the company, were attached by the Merchants' National Bank, but the plaintiffs, rescinding the sales thereof, by consent of the court brought their actions against the receiver to recover the possession of the goods of which they had been fraudulently deprived. The right of the plaintiffs in such actions, upon the discovery of the fraud, to rescind the contracts of sale is unquestioned (2 Parsons on Contracts, 7th Ed. 922; Newmark on Sales, § 359; Cobbey on Replevin, § 265), and, the attachment by the bank being

fraudulent, the several plaintiffs in said actions are entitled to the possession of their respective goods remaining on hand, and to the amount realized by the receiver for the portion thereof sold by him.

The plaintiffs in this suit also seek to recover from the Merchants' National Bank and Julius Loewenberg all moneys fraudulently obtained by them from the company. And, it appearing that the bank collected from the company \$1,106.65 on account of Wolfsohn's debt, and Loewenberg having obtained from the same source and for a similar purpose \$113.50, and goods of the value of \$250.00, amounting to \$363.50, judgments will be rendered against each in favor of the plaintiffs for these respective amounts, which when collected will be applied, after the application of the proceeds of the sale of said goods, so far as necessary to the satisfaction of the judgments awarded the plaintiffs in their respective actions, upon the discharge of which any money so collected from the bank and Loewenberg will be returned to each in proportion to the amount so paid, and as thus modified the decree is affirmed.

MODIFIED.

Argued April 6; decided June 29, 1896

NEVADA DITCH CO. v. BENNETT.*

(45 Pac. 472.)

I. PLEADING—RIGHTS OF DEFENDANTS AGAINST EACH OTHER.—In a suit to determine plaintiff's rights to certain property, and to restrain defendants from interfering therewith, the rights of defendants, as between themselves, are not subject to determination, except so far as, between themselves, they have tendered and joined hostile issues.

* NOTE.—The Abandonment or Loss of Rights of Prior Appropriators of Water on the Public Domain is the subject of annotation to the case of *Hewitt v. Story*, 30 L. R. A. 265; on which subject see also note to *Wimer v. Simmons*, 50 Am. St. 700; and with *McGuire v. Brown*, 30 L. R. A. 384, is a note collecting many authorities on the Change of Use or Channel of Appropriated Water. There is also a note with *Strickler v. City of Colorado Springs*, 25 Am. St. Rep. 245, on Changing the Point of Diversion of Water, and the Washington case of *Isaacs v.*

30	59
31	110
30	59
37	534
30	59
39	126
30	59
41	215
30	59
42	55
42	56
30	59
44	201
44	396

2. **REASONABLE DILIGENCE IN APPROPRIATING WATER.**—In the early summer of 1881, persons claiming an appropriation of water from a public stream posted a notice at the head of the proposed ditch, as required by local custom, stating the amount of water claimed, the purposes for which it was to be applied, and the route and terminals. Work was begun shortly afterwards, and a dam was built and a diversion made for the purpose of aiding in the excavation. The first section, two miles long, was completed in the spring of 1882. During 1882 the ground was cleared for the excavation of the second section to the further terminal. In the spring of 1883 the work was prosecuted till the irrigating season, when it was stopped to permit the use of water through the completed portion. It was resumed in the fall, and continued till the completion of the second section, in the spring of 1884; and during that year water was run through the full length of the two sections—nine miles—and used for irrigation purposes. *Held*, that the claimants, who were pioneers, and of limited means and facilities, exercised due and reasonable diligence in the prosecution of the work.
3. **DATE OF APPROPRIATION BY RELATION²—NOTICE.**—The appropriation of the water of a stream running through the public domain, initiated by the posting and recording of a notice in accordance with a custom, and perfected by a diversion and application of the water to beneficial uses within a reasonable time, dates back, under the doctrine of relation, to the first step taken.
4. **"APPROPRIATION" OF WATER DEFINED.**—A claim to the waters of a stream does not become an "appropriation" until there is an actual application of the water claimed to some beneficial purpose. There is no such thing as a constructive appropriation, nor can any step in the course of perfecting the claim be accomplished except by a genuine physical performance of it.
5. **LIMIT OF APPROPRIATION.**—An appropriation of water from a stream is in every instance limited to the quantity needed to accomplish the beneficial purpose for which the diversion was made: *Simmons v. Winters*, 21 Or. 35, cited and approved.
6. **REASONABLE DILIGENCE IN MAKING APPROPRIATION.**—An appropriator of water from a stream is entitled to a reasonable time after he has diverted and carried the water to the place of use, in which to make the actual application to the contemplated useful purpose: *Hindman v. Rizer*, 21 Or. 112; and *Cole v. Logan*, 24 Or. 304, approved and followed.
7. **TRANSFER OF INCOMPLETE WATER RIGHT—APPURTENANCE.**—Where a person who has initiated but not perfected a water appropriation conveys his interest in the land to which the water right is appurtenant, the right so initiated passes with the land, and the successor can complete the appropriation.

Barber, 30 L. R. A. 665, has a very exhaustive compilation of authorities on the Right of Prior Appropriation of Water, both at common law, and under special statutes or customs. With the case of *Combs v. Agricultural Ditch Co.*, 31 Am. St. Rep. 283, are annotations on the Rights of Prior Appropriators of Water, and For What Purposes Water May Be Diverted.—REPORTER.

² On this question see also *Cole v. Logan*, 24 Or. 304.—REPORTER.

8. **TRANSFER OF COMPLETED WATER RIGHT.**—A sale or transfer of the whole or part of a completed appropriation of water may be made, either in connection with or separate and apart from the land in connection with which the water was originally used; and the purchaser may use it for an entirely different and distinct purpose from the one originally intended.
9. **EXTENSION OF BENEFICIAL USE.**—The bona fide intention to devote the water to a useful purpose, which is required of an appropriator, may comprehend a use to be made by or through other persons, and upon lands and possessions other than those of the appropriator: *Simmons v. Winters*, 21 Or. 35, distinguished.
10. **REASONABLE DILIGENCE IN APPLICATION OF APPROPRIATION.**—Persons contemplating a use, not only to be applied by themselves, but by such others as might come in, claimed an appropriation of water over public lands. They sought to induce immigration by diverting the water, and carrying it to such localities as would be convenient for use. They completed the ditch with reasonable diligence, and, within a year thereafter, users were ready and willing, with sufficient lands to absorb the appropriation by application to a beneficial use. *Held*, that there was sufficient diligence in the application of the use to prevent the appropriation from lapsing.
11. **APPROPRIATION OF WATERS BY GOVERNMENT ON PUBLIC LANDS.**—Non-navigable streams upon the public domain, not appropriated by the methods cognizant to law, are as much the property of the government as the lands through which they flow, and may be taken and used by the government without any of the steps required of private citizens; but such rights cease whenever the land passes to a private individual or is restored to the public domain, unless there is a special grant continuing the government rights to the grantee.
12. **WHEN WATER RIGHT IS NOT APPURTENANT TO PUBLIC LANDS.**—A public use of water from a public stream by the government does not become appurtenant to the soil, so as to pass with it in a grant to private individuals, so as to give the patentee a right of appropriation superior to that of one who perfected an appropriation before the issuance of the patent, but after the diversion of the water by the government.
13. **IDEM.**—Even if the public use of water, made by the government upon the public domain, would pass as appurtenant to the land under an ordinary patent, so as to render the rights of the patentee superior to those of one who had perfected an appropriation before the issuing of the patent, such rights would not pass under a patent in which the grant is expressly made subject to vested and accrued water rights.

From Malheur: MORTON D. CLIFFORD, Judge.

This is a suit instituted August 15, 1893, for the purpose of establishing the date and extent of plaintiff's appropriation of water from the Malheur River, in Mal-

heur County, Oregon, and to enjoin the several defendants from in any way using the waters of said stream so as to interfere with the full and free use of its appropriation. The Malheur River is a perennial, non-navigable stream, taking its rise in Harney County, Oregon, having for its tributaries what are known as the North Fork and Middle Fork of the Malheur River. Its general course is northeasterly across the County of Malheur until it empties in the Snake River. The Malheur valley contains a large body of arid lands, but arable and productive with the use of water. Above the main valley are to be found several small valleys, subject to irrigation from the river or its tributaries. These lands, in their natural state, are generally covered with a growth of sage brush, and what native grasses, the most prevalent being the bunch grass; but in many places upon the lower lands, and especially where water is wont to stand until spring, there is produced a native grass commonly known as rye grass, and at other places native grasses of different kinds are produced with moisture in such abundance as that it may be cut and cured for hay, and is extensively used as feed for stock. The plaintiff's ditch is the lowest on the river, making its diversion from the left bank in section 21, Tp. 18 S., R. 45 E. Then follow the defendants' ditches in the order of their points of diversion: First, the Sand Hollow Company's ditch, taking its water from the left bank in section 15, Tp. 19 S., R. 44 E.; second, the Gillerman-Froman ditch, with point of diversion at the right bank in section 8 of same township; third, the Eastman Brothers & Balentine ditch, diverting from left bank in section 3, Tp. 19 S., R. 43 E.; fourth, the Malheur Farmers' Irrigating Company's ditch, diverting from the right bank in section 33, Tp. 18 S., R. 44 E. Above these come in their order the Pacific Live Stock Company's ditches, four in number: First, the Harper's Ranch ditch, diverting from the left

bank of the main stream in section 13, Tp. 20 S., R. 41 E.; second, the Warm Spring Valley ditch, with point of diversion from left bank of the Middle Fork, in section 13, Tp. 22 S., R. 36 E.; and third, the "Agency ditch west," and "Agency ditch east," the former diverting from the left bank and the latter from the right bank of the North Fork of the Malheur River, both in the NE. $\frac{1}{4}$ of section 4, Tp. 19 S., R. 37 E. There are other ditches, but they belong to parties who have defaulted.

The defendants, the Sand Hollow Ditch Company, Eastman Brothers & Ballentine, the Malheur Farmers' Irrigating Ditch Company, and the Pacific Live Stock Company, by their several answers put in issue the material allegations of the complaint touching appropriation, use, priority, etc., and for further and separate defenses set up their several appropriations, claiming priority therefor as to plaintiff, and pray that the complaint be dismissed, and for costs and disbursements. The Gillerman-Froman Ditch Company interposed a like answer, with the additional allegation that its appropriation is not only prior in point of time to that of plaintiff, but is also prior and superior to any claim of appropriation of any of the other defendants, and prays that their appropriation be established and declared prior and superior to all others. The cause was referred to the Hon. Stephen A. Lowell to take the testimony and report his findings of fact and law, and the decree is based entirely upon his findings, except in so far as it relates to the amount of plaintiff's earlier appropriation. In settling the priority of appropriations it declares that the Pacific Live Stock Company is entitled to the first through its agency ditches to the extent of 750 inches miner's measurement; that plaintiff has the second of 885 inches, and that the appropriations through all the other ditches mentioned are subordinate to these appropriations; that in 1888 plaintiff's appropria-

tion was increased to 3,037 inches, but that as to the increase it has priority over the Pacific Live Stock Company's Warm Spring Valley ditch only. The decree enjoins the diversion of water, except as in accord with the rights of the parties thereby ascertained. From this decree the plaintiffs, the Gillerman-Froman Ditch Company and the Sand Hollow Ditch Company, appeal. The respondents objected in the lower court to any decree determining the priorities as between themselves.

The Nevada Ditch Appropriation.—In the early summer of 1881, C. W. Mallett, I. H. Adams, and W. R. Lee came into the State of Oregon, from Nevada, in search of homes for themselves and families, expecting to settle upon government lands, with the purpose of finally acquiring title thereto. Having come upon the arid lands of the Malheur Valley, they conceived a scheme of constructing a ditch through which to provide water for the irrigation of such lands accessible thereto as they and others should take up, all the lands of the valley being then vacant and subject to settlement, except such as had been selected by the Willamette Valley & Cascade Mountain Wagon Road Company. They were impressed with the idea that they could each acquire from the government a section and a half of land, under laws providing for the sale and disposition of the public domain. The scheme comprehended an early settlement of that particular portion of the valley, and the upbuilding of a reasonably populous farming community. Other home seekers were even then depending in a great measure upon their judgment in the selection of suitable locations for future habitation. So that, in view of these considerations, Mallett, Adams, and Lee determined to construct the contemplated ditch, and, in pursuance of such determination, on July 12, 1881, posted a notice at the point of their intended diversion, claiming an appropriation of 8,000 inches of the water of Malheur

River for agricultural and milling purposes, giving generally the route and terminals of the proposed ditch, and, as soon thereafter as practicable, caused a duplicate of the notice to be filed and recorded in the county clerk's office of the proper county. Prior to posting the notice the parties had run a preliminary line of survey along the proposed route, to demonstrate its feasibility, and had each located a section and a half of land under the ditch, with a view of acquiring title thereto; but eventually Mallett acquired title from the government to only one-half of section 20, Tp. 18 S., R. 46 E., and Adams to one-half of section 24, in Tp. 18 S., R. 45 E., but Lee never acquired title to any of the lands so located by him. Within a few days after the posting of said notice, one G. W. Blanton, with his family, including two sons, James and John, visited the valley, and, being desirous of settling therein, applied to Mallett, Adams, and Lee for an interest in their appropriation, and thereupon bargained for a one-fourth interest; and soon thereafter, on July 21, 1881, they all four entered into a mutual agreement whereby it was provided that Mallett should construct the first section, or about two miles of the ditch, in consideration of \$2,400, each to contribute in money or labor to the extent of one-fourth thereof, and that in case either should fail to so contribute his full proportion, he should forfeit his interest in the ditch to such of the others as should complete it. The agreement was reduced to writing, but, by an oversight, was signed only Mallett, Adams, and Lee. Blanton, however, in March, 1885, after the completion of the ditch, received a deed from the parties so signing the agreement to a one-fourth interest therein.

A permanent survey was provided for, and accordingly made by one C. M. Foster, in August, for the distance of about ten miles, commencing at the point of diversion as claimed in the notice; the first section of two miles being

located upon a grade of 3.20 feet to the mile, and the remaining or second section upon a grade of 2.16. The ditch was subsequently constructed practically upon this line of survey. Mallett and Blanton, with others to help them, began work in the construction of the ditch soon after the permanent survey made by Foster. Adams and Lee in the meantime had gone to Nevada for their families, and in November the former returned. Lee did not return, but one J. A. Walters came, by arrangement with him, to erect a house upon his located land, and to assist in his stead with the construction of the ditch. Prior to his departure Lee paid Mallett \$60, to be applied in part payment of his share of the expense of construction. By this time C. H. Brown, a friend of Mallett's, between whom there had been a previous understanding in regard to removing to the valley, should a suitable locality be found, had come to establish a home in the vicinity. Thenceforth Mallett, Adams, Blanton, and Brown pushed the work of construction throughout the winter, as the weather would permit. In the spring these parties were joined in their work by Walters and others, to wit: J. C. Arnold, T. W. Halliday, and J. H. Chandler, who had all come from Nevada, by arrangement either with Lee or Adams, with a view to settling under the ditch, and later in the spring the first or two-mile section was completed. In the fall the way was cleared for the second section, which consisted in grubbing out the sagebrush and other shrubs, and putting the land in condition for the plow and scraper. This section is a little over six miles in length, and terminates at what is known as the Dunbar Place or tap. In the spring of 1883 they began the work of excavation upon this last section of the ditch, and continued without intermission, except to permit the use of water during the season for irrigating purposes, into the spring of 1884, when it was completed and accepted. As to this

there is some disagreement among the witnesses; some say that a little work, cleaning out the ditch at a place or two along the line, was done in the spring of 1885, and that the section was not accepted as completed by a committee appointed for that purpose until that time; but they all concur that it was practically completed in 1884. Walton, and perhaps Arnold, worked in the interest of Lee for about a month in the spring of 1882, while the first section was in process of construction; and thereafter Lee failed to contribute anything toward the expense of construction, and thereupon Mallett assumed and discharged his liabilities, and assumed the ownership of his interest in the ditch, in accordance with the stipulations of the agreement entered into prior to Lee's departure for Nevada. This interest Mallett subsequently treated as his own, and disposed of subdivided portions thereof from time to time by deed as opportunity offered.

Morfitt Extension.—In September, 1883, one William Morfitt acquired an interest in the ditch, and by verbal agreement for the promoters thereof, extended it some four miles in an easterly direction, at his own expense, stipulating to convey the extension to the promoters at any time that they saw fit to pay him the cost of construction. This extension was completed in 1884, some say concurrent in time with the completion of the last section of the original ditch, and others soon after, in the fall of 1884, or the spring of 1885.

Danielson Extension.—In 1885 one Minnie J. Danielson also acquired of the original promoters an interest in the ditch, and, by an agreement with them like that with Morfitt, constructed upon her own account an extension of some six miles of ditch, commencing at the lower termini of the Morfitt extension, and running almost due south, which was completed and water passed through it in 1886. In 1888 the head of the ditch was changed to a

point about three-fourths of a mile above the original point of diversion, and the entire ditch was cleaned out and enlarged so that it would carry an increased flow of water.

Thus was constructed the entire ditch. Through conveyances subsequently made by all the parties holding interests in the ditch, and the appropriation of water made through its instrumentality, the Nevada Ditch Company, the plaintiff herein, has acquired the ownership thereof. The stockholders in said company claim to be entitled to the use of the appropriation in proportion to the amount of stock held by each. Some of them are using the water upon lands owned and cultivated individually, and others are renting to parties having no interest in the Nevada Ditch Company; but generally the water is being used for agricultural purposes. Since the year 1886, the year 1894 excepted, plaintiff's water supply has been cut short by reason of the use made of it above its ditch by the defendants. The present capacity of the ditch in the first, or three-twenty, section is 10,353 inches, and in the second 3,037 inches, miner's measurement. Water was first turned in during September, 1881, which was used in its construction, and was first used for irrigation purposes in 1883. During the season from fifty to sixty acres of land were irrigated, and in the year 1884 two or three times as much water was used for like purposes. From this time on lands were rapidly reduced to cultivation, and in 1886 there appears to have been use made of all the water the ditch was capable of carrying. As shown by the record of deeds, Cambridge Arnold, T. W. Halliday, J. H. Chandler, J. A. Walter, C. H. Brown, David Dunbar, Daniel Smith, William Morfitt, and Mary Richardson all acquired an interest in the ditch in 1883. James W. Virtue acquired an interest in 1884, A. McGregor and Minnie J. Danielson (successor to Chas. Howard) in 1885, and F. R. Coffin, J. L. Cole, and James Richardson in 1886. Many of these

persons bargained for their respective interests some time before procuring the deeds. Besides these, it is in evidence that James Blanton, John Blanton, and J. W. Green held interests in the ditch in 1883, so that, including the original promoters, Mallett, Adams, and G. W. Blanton, there were fifteen persons possessing subdivided interests in the ditch in 1883, to which number was added one in 1884, three in 1885, and three in 1886, making twenty-two in all. I. H. Adams, C. W. Mallett, C. H. Brown, T. W. Halliday, J. C. Arnold, and J. W. Green, all of whom held claims under the ditch, began the use of water for irrigation purposes in 1883. The following named persons, having claims under the ditch at the time, began the use of water, to wit: Daniel Smith, James Richardson, James W. Virtue, G. W. Blanton, J. L. Cole, and A. McGregor in 1884; David Dunbar in 1885, and J. A. Morton, A. Draper, Frank Draper, A. Darr, Joe Darr, G. W. Smith, G. W. Long, John Blanton, James Blanton, either in 1884 or 1885, the time is not definitely fixed. J. A. Walter used in 1886, and there is some evidence tending to show that Minnie J. Danielson used the same year. Comprehending all these, there should have been twenty-four users of water during the years named. William Morfitt never used; James and Mary Richardson, Daniel Smith, and James W. Virtue made a temporary use for the purpose of proving up on their desert claims, since which time, about 1885, they have allowed their claims to lay idle, but have leased the use as they could, and the evidence tends to show that Minnie J. Danielson used in the same manner, and for a like purpose; but there is some testimony to the effect that she used for agricultural purposes, and has since, in conjunction with Keisel and Shilling, reduced to cultivation by its use some 400 acres.

There is no data by which it may be ascertained what amount of land she claimed under the ditch at the time

she began its use, or what progress she made in reducing the same to cultivation, or what beneficial application she made of the water. Those having claims under the ditch who began to use the water in 1883 have brought into cultivation prior to the commencement of this suit 1,010 acres, to wit: Chandler, 40 acres; Mallett, 310; Adams, 310; Brown, 160; Halliday, 80; and Green, 110. Those who began using in 1884, 390 acres, to wit: Wilson Improvement Company, who purchased of Long, 100 acres; John Blanton, 25; G. W. Blanton, 120; James Blanton, 50; and A. McGregor, 95. Those of 1884 or 1885, 183 acres, to wit: Darr, 70 acres; Dunbar, 100; and Smith 13; aggregating 1,583 acres. Aside from this, Walters acquired an interest in the ditch in 1883, entered 160 acres under the ditch the same year, and began the use of water in 1886. All this tract appears to have been reduced to cultivation, and now stands in the name of Steel, and it is probable that Minnie J. Danielson, who possibly began the use in 1886, has reduced to cultivation a portion of her then holdings, but as to this the proof is very indefinite. There are others who had claims under the ditch, and began the use as early as 1883 and 1884, but it is difficult to ascertain from the evidence who succeeded them, and what amount of land has been reclaimed by them. As an instance, Arnold held a claim, owned an interest in the ditch, and began the use of water in 1883, and it is in evidence that there is now sixty acres in cultivation upon this ranch, but it does not appear who succeeded him either as to his interest in the land or the ditch, probably J. Morrison. It will be noticed that all the parties herein named who began the early use of water, and who have succeeded in reducing their lands to cultivation, except Minnie J. Danielson, are under the first two sections of the ditch, which ends at the Dunlap Place, or the beginning of the Morfitt extension. There are approximately 1,970

acres irrigated under the first two sections, 320 acres under the Morfitt extension, and 679 under the Danielson extension; but the inception of the use of the water, as it applies to individuals now engaged in irrigation under the two extensions, cannot be traced in a single instance, excepting possibly Minnie J. Danielson, and the same may be said of a small proportion of those using under the main section.

The Sand Hollow Ditch Appropriation.—In July, 1885, several persons, viz.: E. L. Willey, Geo. E. Bennett, M. G. Hope, and Truman Conforth, ran a line of survey for a ditch, and in September of the same year they, with other associates, began its construction, and in the spring of 1886 completed the same, and by means thereof made a diversion of water and began the use of it for irrigating purposes. No notice of appropriation was ever posted.

The Gillerman & Froman Appropriation.—In December, 1882, Frederick Gillerman, F. K. Froman, Frederick Niehart, William Pennington, and Robert Goff posted a notice on the right bank of the Malheur River, at point of intended diversion, claiming an appropriation of 3,000 inches of water for irrigation purposes, but no record was made of the notice. The point of diversion is at or near a point selected by one L. B. Rinehart in 1877 or 1878, who caused a survey to be made therefrom at that time, with the supposed intention of constructing a ditch, and thereby making a diversion of the water. In June, 1883, these parties began the construction of their ditch, and excavated some 300 yards thereof, extending from the point of diversion easterly to its confluence with an old bed of the river, at which latter point a headgate was constructed, the water turned in through the ditch, and allowed to escape down the old channel, and thence again into the river. This was all accomplished in June. About September 15, 1883, Foster made a survey and location of this ditch, which followed in the main the Rinehart

survey of 1877 or 1878. The ditch was fully constructed and completed in April, 1884, and water turned through it for the first time in volume estimated at from 2,500 to 3,000 inches, and during the irrigating season parties having holdings under it began to use in limited quantities.

Eastman Bros. & Ballentine Appropriation.—In 1877 J. D. Osburn, Henry Sherman, and others constructed a small ditch leading from the Malheur River at a point in section 3, Tp. 18 S., R. 43 E., into an old slough, and made use of the water thereof, when the river was high, for the purpose of irrigating wild hay land, and some small tracts bearing grain and vegetables, from 1877 to 1881, inclusive. Sherman was at the time the owner of the tract of land now owned by Eastman Bros. & Ballentine, who succeeded to his interest by regular conveyances, but no water was ever used thereon from said ditch. There is testimony, however, of a verbal sale made by Osburn of his interest in the ditch to Eastman Bros. & Ballentine. This ditch was suffered to fall into decay, and in the year 1882 one McLaughlin and others constructed a ditch upon their own account, which intersected and cut off the old ditch near where it entered said slough, and thereafter, in 1884, Eastman Bros. & Ballentine reopened, repaired and enlarged the old ditch from the river to a point near its intersection with the McLaughlin ditch, and from thence constructed a new ditch to their premises, which was completed in 1885, and water utilized through it.

The Malheur Farmers' Irrigation Ditch Company's Appropriation.—About the 15th of September, 1883, W. G. Thompson and others procured a survey of a site to be made, about seven miles in length, and in the month of October began the work of construction of a ditch, which they continued until completed, in 1885, the entire length of the surveyed site, and thereby diverted the water and began the use of it for irrigating purposes. In November,

1880, J. D. Osburn had a survey run for a ditch commencing at a point near the head of the Malheur Farmers' Irrigating Ditch Company's ditch, and continuing upon nearly the same line that Thompson had surveyed in September, 1883; but he at no time entered upon the actual work of construction, and posted no notice of his intended appropriation. Later in the year 1880 Osburn procured another survey to be made, commencing about a mile and a half above the head of the Malheur Farmers' ditch, and running thence down the river to its intersection, near the head of said ditch, with the Thompson line of survey, thence continuing in about the course of the Thompson survey throughout its entire length. At the head of this survey Osburn and his partner Lineberger posted a notice claiming an appropriation of 5,000 inches of water, had the same recorded, and in the years 1880, 1881, and 1882 excavated a small section near the head, but made no diversion thereby, or otherwise utilized the same.

Pacific Live Stock Company's Appropriations.—The defendant The Pacific Live Stock Company, a corporation formed in January, 1888, is the owner of four different ditches, all diverting water from the Malheur River and its tributaries above the plaintiff's ditch, and all other ditches belonging to the parties to this appeal. The first is known as the Warm Spring Valley ditch, constructed in 1888. No notice of appropriation of water by this ditch was posted or given, and the actual diversion with commencement of use took place in 1889. The second, known as the Harper's Ranch ditch, was constructed between the 20th day of February, 1883, and the 10th day of May, 1884, upon which last-named date actual diversion of water was made, without previous notice thereof. There is no claim that the appropriation through this ditch was made earlier than April, 1883. The two other ditches owned by this company are known as the Agency ditches,

and are more particularly designated as the "Agency ditch east" and "Agency ditch west." The point of diversion of the latter is upon the left bank of the North Fork of the Malheur River, and that of the former is from the right bank of the same fork, and situated in the same quarter section, only a short distance above the latter. A more particular statement of the diversion and the appropriation claimed through the instrumentality of these two Agency ditches is necessary to determine the priorities as between them and the plaintiff's diversion. In the year 1874, sections 3, 4, and 10, Tp. 19 S., R. 37 E., Willamette meridian, was a part of the Malheur Indian Reserve, which had been previously set apart by the government as an Indian agency. At that time, Mr. S. B. Parrish, the agent in charge, caused the route of the "Agency ditch west" to be surveyed, and the ditch constructed from the point of diversion through parts of sections 3 and 4, down past the agency buildings previously erected on section 10. The purpose of constructing the ditch seems to have been to enable the agency farmer to produce hay, vegetables, and cereals for use and consumption in and upon the agency, and to propel certain machinery consisting of a lathe and other mechanical appliances connected with some of the agency buildings, all which were to be and were subsequently utilized in teaching and encouraging the Indians then settled upon the reservation, to the number of some 600, in the arts of civilization and the ways of industry. Under the direction of the agent and the agency farmer there was irrigated, by means of the ditch, from forty to fifty acres of grain, a like amount of wild hay, and some garden, and a portion of the water was used in connection with the mechanical appliances above mentioned. The "Agency ditch east" was constructed under the direction of the Indian agent in charge in 1876. It lies entirely within sections 3 and 4, and was utilized

by the agent and the agency farmer in the irrigation of about 100 acres of land.

About the month of July, 1878, the Indians broke away from the reservation, and engaged in hostilities against the government, but, having been subdued and captured during the remaining summer and early fall, were transferred and taken to other reservations, so that the Malheur Indian Reserve thenceforth ceased to be occupied as an Indian reservation. The government, however, maintained an agent in charge of the buildings and other improvements thereon until the sale and disposal of them with the lands upon which the same were situated. During this interim water was not employed through either of said ditches for any useful purpose, except incidentally by parties living in the agency building, by permission of the agent in charge, and that to a very limited extent. On September 13, 1882, and May 21, 1883, by proclamations of the President of the United States, all the lands of the Reserve, except 320 acres occupied as a military post, were restored to the public domain, and thrown open to occupation and settlement, except the above-mentioned sections 3 and 10. On September 28, 1883, E. L. Bradley, the keeper in charge of the government property at the agency, pre-empted the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and lot 1 of said section 4, upon which lands the heads of both ditches are located, and later obtained a patent therefor from the United States. Subsequently the Pacific Live Stock Company acquired the title thereto by mesne conveyances from Bradley. During the year 1883 the agency buildings and sections 3 and 10 were disposed of by the general government at public auction, and were purchased by one T. M. Overfelt, for the use and benefit of Overfelt & Company, for about \$7,000. On May 19, 1885, a patent was issued to him for the premises, but in April

ownership of a ditch appurtenant to the land: *Low v. Schaffer*, 24 Or. 239; *Simmons v. Winters*, 21 Or. 35 (28 Am. St. Rep. 727); *Hindman v. Rizor*, 21 Or. 112.

But a verbal sale of a water right alone works an abandonment: *Low v. Schaffer*, 24 Or. 239; *Hindman v. Rizor*, 21 Or. 112; *Smith v. O'Hara*, 43 Cal. 371; *Barkley v. Tieleke*, 2 Mont. 59; *Salina Irr. Co. v. Salina Stock Co.*, 7 Utah, 456.

As to the agency ditches, which have been given priority over plaintiff, we submit the following propositions:

(1) The property rights of the United States in an unnavigable stream flowing across public land are precisely those of an individual as to a similar stream flowing over his lands: *Union Mining Co. v. Ferris*, 2 Sawy. 176 (Fed. Cas. No. 14371); *Mining Debris Case*, 9 Sawy. 492 (18 Fed. 753); *Vansickle v. Haines*, 7 Nev. 249; *Lux v. Haggin*, 69 Cal. 255.

(2) Congress has absolute control over the public lands: *Gibson v. Choteau*, 80 U. S. 93; *Jourdan v. Barrett*, 45 U. S. 168; *McCarty v. Mann*, 2 Dill. 441.

(3) Only the President, or the head of a department, can make a reservation of public lands, and such reservation cannot be inconsistent with an act of Congress: *Grisar v. McDowell*, 73 U. S. 363; *Wolsey v. Chapman*, 101 U. S. 755; *Wilcox v. Jackson*, 38 U. S. 498.

(4) As to the effect of the severance of the ditch by the President's proclamation, see *Canal Co. v. Gordon*, 73 U. S. 561; *Reynolds v. Hosmer*, 51 Cal. 205.

(5) The acts of Congress of 1866 and 1870 (R. S. U. S., §§ 2339, 2340), subject to the appropriation and use of water flowing in unnavigable streams across the public domain to the laws, customs, and decisions of the states in which the streams are found, and the various agencies of the government are as much bound by this policy as are private individuals. The only possible right the United

States could have urged to the water taken through these ditches in 1875 and 1876 was that of a riparian proprietor, which was not transmitted to the Pacific Live Stock Company, and is not the right upon which it relies. The patents issued in 1885 and 1889 for the lands now irrigated from said ditches expressly save the rights of appropriation by other parties theretofore made. If the diversions made in 1875 and 1876 had been valid as appropriations, which they were not, they were abandoned and lost in 1878, and the new right dates only from 1885: *Kinney on Irrigation*, §§ 145 et seq.

(6) They were not aided or kept intact by the casual and insignificant uses of the water by private individuals: *Davis v. Gale*, 32 Cal. 26 (91 Am. Dec. 554).

For *Gillerman, Froman et al.* there was a brief and an oral argument by *Mr. Thos. H. Crawford*, urging these points:

To make a valid appropriation of water upon the public domain there must be some actual beneficial purpose existing at the time, or contemplated in the near future, for which the water is to be utilized; and the needs of the use for which the appropriation is made is the limit in every case to the amount of water that may be taken and held: *Simmons v. Winters*, 21 Or. 35 (28 Am. St. Rep. 727); *Hindman v. Rizor*, 21 Or. 120; *Low v. Rizor*, 25 Or. 551; *Weaver v. Eureka Lake Co.*, 15 Cal. 271; *Atchison v. Peterson*, 87 U. S. 514; *Nichols v. McIntosh* (Colo.), 34 Pac. 278; *Perogery v. McKissick*, 79 Cal. 572; *Barrows v. Fox*, 98 Cal. 63; *Barnes v. Sabron*, 10 Nev. 243 (28 Am. & Eng. Enc. Law, 995).

A settler upon the public lands cannot claim and hold, as against subsequent bona fide appropriators, more water than is necessary to irrigate the lands that he has settled

upon and claimed in good faith, and he cannot claim any water to irrigate lands which he neither owns, has possessory title to, or intends to cultivate: *Simmons v. Winters*, 21 Or. 35 (28 Am. St. Rep. 727); *Barnes v. Sabron*, 10 Nev. 243; *Weaver v. Eureka Lake Co.*, 15 Cal. 271; *Orton v. Dixon*, 13 Cal. 38; *Kleinschmidt v. Grciser*, 14 Mont. 484 (43 Am. St. Rep. 652); *Combs v. Agricultural Ditch Co.*, 17 Colo. 146 (31 Am. St. Rep. 275); *Dick v. Caldwell*, 14 Nev. 167.

An appropriation of water is not complete until the water is applied to the intended use, and the amount so applied within a reasonable time is the limit of the appropriation, as against subsequent appropriations, and in this respect the grantee's rights obtained from an appropriator, as against subsequent appropriators, can be no greater than those possessed by his grantee at the date of his grant: *Farmers' High Line Canal Co. v. Southworth*, 13 Colo. 130 (4 L. R. A. 767); *Schilling v. Rominger*, 4 Colo. 100; *Seiber v. Frink*, 7 Colo. 149; *Thomas v. Guirand*, 6 Colo. 430; *Whceler v. Northern Colo. Irr. Co.*, 10 Colo. 582 (3 Am. St. Rep. 603); *Low v. Risor*, 25 Or. 556; *Hindman v. Risor*, 21 Or. 112; *Cole v. Logan*, 24 Or. 304; *Fort Morgan Land Co. v. South Platte Ditch Co.*, 18 Colo. 1; *Black's Pomeroy on Water Rights*, § 48.

Water cannot be appropriated for a speculative purpose, nor can it be acquired by constructive appropriation: 28 Am. & Eng. Enc. Law, 992; *Weaver v. Eureka Lake Co.*, 15 Cal. 271; *Dick v. Caldwell*, 14 Nev. 167; *Combs v. Agricultural Ditch Co.*, 17 Colo. 146 (31 Am. St. Rep. 275); *Eddy v. Simpson*, 58 Am. Dec. 408.

An appropriator of water without notice of intention posted or given, and without compliance with local usages or customs, or statutory regulations, gains the right to the water at the time his diversion is fully completed, and then only to the extent and in the manner of such actual

completed diversion: *De Neocha v. Curtis*, 80 Cal. 397; *Burrows v. Burrows*, 82 Cal. 564; *Well v. Mantes*, 90 Cal. 583; *Waterson v. Saldunhere*, 101 Cal. 107; *Salazar v. Smart*, 12 Mont. 395.

Where a notice has been posted, and such acts done as to give the public notice of having actually commenced work, and of a purpose to diligently prosecute the same until the appropriation is completed, and such notice and acts are followed up diligently by active work until the water is actually diverted and appropriated, the rights of the appropriator relate back to the date of posting notice and beginning active work: *Stark v. Barnes*, 4 Cal. 412; *Osgood v. Eldorado Water Co.*, 56 Cal. 571; *Kelley v. Natona Water Co.*, 6 Cal. 109; *Sieber v. Frink*, 7 Colo. 148; *Ophir Mining Co. v. Carpenter*, 4 Nev. 534 (97 Am. Dec. 550); *Conger v. Weaver*, 6 Cal. 548 (65 Am. Dec. 528); *Kimball v. Gearhart*, 12 Cal. 27.

If the quantity of water actually diverted is no more than is needed for the contemplated use, the appropriator is not compelled to use it all the first year, but has a reasonable time in which to apply the water diverted to the use intended: 28 Am. & Eng. Enc. Law, 995; *Simmons v. Winters*, 21 Or. 35 (28 Am. St. Rep. 727); *Conant v. Jones* (Idaho), 32 Pac. 250.

The notice posted by Mallett and Adams was for irrigation purposes, and limited the amount of water to the amount needed by them for the beneficial use of irrigating the lands claimed and owned by them, and intended to be cultivated: *McKinney v. Smith*, 21 Cal. 374.

The forfeiture by Lee of his rights under the notice could not have the effect of enlarging the rights of Adams or Mallett, and by this means give them a right to more water than they needed for the irrigation of their lands: *Low v. Rizer*, 25 Or. 551.

For the Pacific Live Stock Co. there was a brief and an oral argument by *Mr. Chas. W. Parrish*.*

For Bennett and the Sand Hollow Ditch Co. there was a brief and an oral argument by *Mr. O. F. Buse*.*

For the Malheur Farmers' Irrigation Ditch Co. there was a brief and an oral argument by *Mr. William Smith*.*

MR. JUSTICE WOLVERTON, after stating the facts in the foregoing language, delivered the opinion of the court.

Before proceeding to the discussion of the questions of vital importance, we will dispose of some that may be regarded as preliminary or incidental only. The defendants all filed demurrers to the complaint, which were general in their nature, and were all overruled by the court below. It is insisted here that the court erred in so doing. The objection is taken upon the theory that plaintiff's complaint comprehends an aggregate of individual appropriations, taking their inceptions at different periods, and that the complaint should have stated facts supporting each individual appropriation, and then the acquirement of them by plaintiff; but the complaint states a single appropriation upon which all the rights claimed are dependent, hence the objection is not well taken.

1. It is next contended by the defendants the Gillerman-Froman people that the especial rights of each of the defendants touching the quantity and priority of their several appropriations should be determined here, as well as plaintiff's, and the correlative rights of all the parties to the suit finally fixed and determined. The point is

* These three parties presented a combined brief, of which a synopsis would have been printed but for the fact that the law argument, extracts from the evidence, and the authorities cited were so inseparably commingled as to make it impossible.—REPORTER.

more especially urged as it affects the Gillerman-Froman people. The other defendants earnestly object to such a course, and their objection is based upon the condition of the pleadings, as well as the course which was pursued in the court below. The answer of each of the defendants controverts the plaintiff's claim, and, in order to show a prior right to that of plaintiff, each has set up its own claim, but no defendant has anywhere, by his or its pleading, assumed to controvert the alleged rights of any of the co-defendants, and no issue upon the record was ever made between any of them. However, the Gillerman-Froman people have alleged generally that their claim is prior and superior to all the other defendants, as well as to that of plaintiff, and they ask affirmative relief. But this is not denied by any of their co-defendants, nor would it seem that any were called upon to do so. The trial in the court below seems to have proceeded upon the theory that there was no contention among co-defendants, and no countervailing testimony was offered as between themselves. In this state of the record, and by the course of prior procedure, this court is powerless to determine the quantity and priority of any appropriations, except as between plaintiff and the several defendants: *Hargrave v. Cook*, 108 Cal. 72 (41 Pac. 18, 30 L. R. A. 390); *Pomeroy on Code Remedies*, § 808. It would have been much better if the rights of all the parties to the controversy could have been settled and determined in this suit. Such a thing could have been accomplished, had the pleadings and proofs been formulated and directed to that end and purpose; but, without indicating what would be the proper practice in such cases, let it suffice to say that this case is not in a condition to apply the remedy demanded.

2. The plaintiff, by its complaint, claims a single appropriation of 3,037 miner's inches of the water of the Malheur River, made as of date July 12, 1881, that being

the date when Mallett, Adams, and Lee posted their notice of appropriation at the original point of diversion through plaintiff's ditch. To sustain the appropriation as of the date named, the doctrine of relation is invoked, it being contended that the promoters of the ditch prosecuted the work of construction with reasonable diligence, and had it fully completed within a reasonable time after the posting of such notice. There can be no question but that they did pursue the work of construction with all the diligence that could reasonably be required of them. The work was commenced in August or September after the posting and recording of their notice, and for the purpose of aiding in the excavation of the first section of upwards of two miles, a dam was constructed at the head of the proposed ditch, and a diversion made. This section was completed as early as the spring of 1882. Prior to the posting of notice a preliminary survey had been run with a triangle, covering, in extent, at least the first section completed; but in August prior to the beginning of the work of construction a permanent survey was made by C. M. Foster, and stakes and monuments set to indicate the route and actual location of the ditch, which was practically followed in the work of construction. This survey is spoken of as being ten miles in length, but the actual length of the ditch from the point of first diversion is something less than nine miles. In the fall of 1882 the way was cleared for the second section, reaching to the eastern terminal of the Foster survey. In the spring its excavation and construction was prosecuted until the irrigating season of that year, when it was discontinued to permit of the use of water through the completed portion of the ditch, by which use from forty to fifty acres of garden and small crops were irrigated during the season. The work of construction was resumed in the fall, and continued until the completion of the second section, in the

spring of 1884. Water was run through the full length of these two sections in the year 1884, and used for irrigating purposes. There is some dispute as to whether the latter section was completed in the spring of 1884, or a year later; but, if not in every detail, it was practically completed in 1884. This shows an exercise of due and reasonable diligence, considering the magnitude of the undertaking, and the circumstances and difficulties usually attending the inception and prosecution of such work in a new country by pioneers with limited means and facilities: *Kimball v. Gearhart*, 12 Cal. 28.

3. It was sought to prove the existence of a custom, which it is alleged prevailed in that section of the country, whereby parties seeking to make an appropriation of water for agricultural or beneficial purposes were required to post at the point of diversion a notice containing in substance a statement of the amount of water claimed, the purposes to which it was to be applied, the names of the appropriators, the general direction of the proposed ditch, and the terminals thereof, and have the same immediately recorded in the office of the county clerk or the proper recording officer of the county in which the appropriation was sought to be made. The existence of such a custom is combatted by some of the defendants, and by others it is admitted, but in a qualified sense. By the latter it is claimed that the recording of the notice was not required. The referee found that the custom did exist at the time of the inception of each and every of the water appropriations involved in the controversy, to the full extent, as stated above, and in this he is supported by the evidence. Under these conditions the plaintiff's appropriation would relate back to the date of posting the notice by Mallett, Adams, and Lee, July 12, 1881; certainly to the date of their commencing the construction of the ditch, which was either in August or September following. The rule

seems to be that where notice is required, and one is given, and thereafter the work necessary and requisite to secure a diversion for a beneficial use is begun in good faith, and prosecuted with due and reasonable diligence until completed, and actual diversion made, the appropriation relates back to the first step taken. The authorities are somewhat in conflict as to what constitutes the first step, whether the posting of the notice, or the actual commencement of work: *Cole v. Logan*, 24 Or. at page 309 (33 Pac. 568); *Kinney on Irrigation*, § 168; *Woolman v. Garringer*, 1 Mont. 535. If, however, there has been an unreasonable delay in carrying forward the work of construction, and the works and appliances necessary to a diversion for the useful purpose intended are not completed within such time as reasonable diligence would require, the appropriation is considered by Mr. Black as beginning with the date of actual diversion, and by Mr. Kinney when the appropriation is fully completed: *Black's Pomeroy on Water Rights*, § 55; *Kinney on Irrigation*, § 161. But whether the one or the other of these authorities should be followed does not become material for us to determine.

It is not seriously contended that the plaintiff's appropriation is invalid, but that it should be confined as to quantity and priority to the rights acquired by Mallett and Adams, which would accord to it an appropriation of from 260 to 500 inches, dating from August or September, 1881, and that any appropriation in excess of this quantity should be recognized only as having been made at the date of actual user for beneficial purposes. In other words, it is insisted that plaintiff's present appropriation is a conjoined aggregate of lesser appropriations, having their inception at different dates, and that, when traced to their several sources, that only which is personal to Mallett and Adams will antedate the defendants' appropriations, and

that, if thus analyzed, the quantity of the appropriation having priority over those of the defendants will be found to be small, and not to exceed the quantity named. This brings up a question which we have found difficult of solution, and the conclusion at which we have arrived has not been reached without some misgivings. Let us first get a clear idea of the elements which enter into and go to establish a valid appropriation of the waters of a public stream to a beneficial purpose, as we shall be aided by the process, and be the better enabled by the application of analogous cases to the salient features to determine with greater satisfaction the quantity and legal status of the plaintiff's appropriation. The rule is concisely laid down by Mr. Justice MOORE, in *Low v. Rizer*, 25 Or. at page 557, that "to constitute a valid appropriation of water three elements must always exist: First, an intent to apply it to some beneficial use, existing at the time or contemplated in the future; second, a diversion from the natural channel by means of a ditch, canal, or other structure; and, third, an application of it within a reasonable time to some useful industry." In elaboration of these elements, Mr. Pomeroy says of the first: "The fundamental doctrine is well settled that the appropriation must be made with a bona fide present design or intention of applying the water to some immediate useful or beneficial purpose, or in present bona fide contemplation of a future application of it to such a purpose, by the parties thus appropriating or claiming": Black's Pomeroy on Water Rights, § 48. Mr. Justice LORD, in *Simmons v. Winters*, 21 Or. at page 42 (27 Pac. 7, 28 Am. St. Rep. 727), says: "There must be some actual beneficial purpose, existing at the time or contemplated in the future, as the object for which the water is utilized." This language was approved by Chief Justice BEAN in a later case: See *Hindman v. Rizer*, 21 Or. at page 120 (27 Pac. 13).

It has been suggested that the intent and the application is a matter personal to the appropriator, and that whatever he purposes to do with the water must be done by himself, and in connection with his own property. From the nature of things, the intent to apply to some present or future contemplated use must rest with the appropriator. It is a mental status which may manifest itself by subsequent declarations and acts, such as posting notice, diverting the water by the building of a dam, the construction of a ditch or other means, and by applying it to the contemplated use. Ordinarily a person may declare his intentions through another, and may act through an agent, and yet the declarations and acts are as much his as if they were the result of his personal and physical application, and unless there is some reason why an appropriator may not invoke the ordinary agencies for the purposes of perfecting his appropriation, he ought not to be denied the right of their employment for such purposes. So far as it may become necessary to construct the necessary appliances to secure the actual diversion of water, and to transport it to the place of use, and even as it concerns the physical application to the use, there can be no doubt of the right to his employment of such agencies. But the purposes of the appropriation must abide with the appropriator, it must be a design of his concoction or adoption, and the use he proposes must be a beneficial one; thus far it is perfectly manifest that the act is personal to himself. So that, taking these propositions as granted, the inquiry is narrowed to the object to which the use must be applied. Must the appropriator be the proprietor of or have an interest in the object in connection with which the water must be utilized, in order to perfect the appropriation, or will it serve the purpose if the water is supplied to some other person, who makes the appropriation in connection with an object in which the appropriator has no interest?

To state the proposition concisely, Can A appropriate water for the purpose of running B's mill, or irrigating his lands, or working his mines, and will such use made of it by B, granting it to be beneficial, inure to the appropriator's benefit, in the process of perfecting his appropriation? For the present, let us consider the other two elements which go to make up a valid appropriation: As the water of a public stream, while flowing in its natural channel, is the property of the public, an individual, if he would obtain a usufructuary interest therein, must lay hold of so much of it as is required for his use; that is, make a diversion whereby he is thereafter enabled to assert absolute control over it. This needs no elucidation. The third element requires an actual user for some beneficial purpose.

4. The term "appropriation" is often loosely used by the authorities, and in general it is used with reference to a claim to the use of the water of a public stream from the time of the inception of the right, at all the intermediate stages, and down to the time when the last act is accomplished by which the right is finally and completely secured. An appropriation proper is not made until there has been an actual application of the water claimed to some beneficial purpose or some useful industry; all rights acquired prior to this time, at whatsoever step in the process, amount simply to a claim of an appropriation, but they are none the less rights and privileges which may be asserted and maintained against all persons not entitled to priority in rights and privileges of like nature. The Supreme Court of California defines the word "appropriation," in the connection which we are now considering it, as "the intent to take, accompanied by some open physical demonstration of the intent, and for some valuable use": *McDonald v. Bear River Min. Co.*, 13 Cal. 233. It is said in *Thomas v. Guiraud*, 6 Colo. 533: "The true test of appro-

priation of water is the successful application thereof to the beneficial use designed." In *Larimer County Reservoir Co. v. People*, 8 Colo. 614 (9 Pac. 794), HELM, J., in speaking for the court, says: "We are of the opinion that when the individual, by some open, physical demonstration, indicates an intent to take, for a valuable or beneficial use, and through such demonstration ultimately succeeds in applying the water to the use designed, there is such an appropriation as is contemplated by our constitution and statutes." This language was approved, and the doctrine thereby stated adopted in a late case in the same state: See *Fort Morgan Land Co. v. South Platte Ditch Co.*, 18 Colo. 1. In *Farmer's High Line Canal Co. v. Southworth*, 13 Colo. 115 (21 Pac. 1028, 4 L. R. A. 767), a complaint by which it was sought to establish an appropriation was held insufficient upon demurrer in that it did not allege the application of the water to the plaintiff's lands. So in *Peregoy v. McKissick*, 79 Cal. 572 (21 Pac. 967), THORNTON, J., says: "If the plaintiff has never used the water for any useful or beneficial purpose, he was never an appropriator," and in *Low v. Rizer*, 25 Or. at page 557 (37 Pac. 82), Mr. Justice MOORE says: "There having been a failure to make the application of the water to the irrigation of the land within a reasonable time, one of the elements of a valid appropriation is lacking, and hence the defendant's claim to a prior appropriation must fail." Mr. Kinney, in his work on Irrigation, § 167, says: "The appropriation becomes perfect only when the ditches or canals are completed, the water diverted from its natural stream or channel, and actually used for beneficial purposes." So that actual user for a beneficial purpose is the true and only final test touching the question whether a party's claim has ripened into a valid appropriation. There can be no constructive appropriation, nor can any step required to be taken throughout the whole project and course of

water appropriations be constructively accomplished. It is the actual physical performance of every essential requisite, from the time the purpose is definitely conceived down to the ultimate user of the water in connection with the advancement of some useful and beneficial industry, that matures and finally accomplishes the "appropriation."

5. But this understanding of what it takes to constitute an appropriation does not preclude claimants from acquiring valuable rights and privileges prior to the time when such claims ripen into a full or completed appropriation. There are two periods of gestation, if we may be allowed the expression: One concerns the time required, measured by due and reasonable diligence, for the building and construction of such works and appliances as may be necessary and convenient for diverting the water and carrying it to the place of use (of this we have spoken heretofore); and the other the time needful to utilize the water by the actual application of it to the contemplated beneficial purpose. The appropriation is in every instance limited in quantity and quality by the uses for which the appropriation is made: *Atchesen v. Petersen*, 87 U. S. (20 Wall.) 507. In *Simmons v. Winters*, 21 Or. 35 (28 Am. St. Rep. 727, 27 Pac. 7), Mr. Justice LORD says "the amount of water appropriated must be restricted to the quantity needed for the purpose." The reason of the rule is that by nature the water supply is limited in the arid regions, and habitation is dependent upon its use to make the earth yield up its precious metals and the soil to bring forth its fruits in season, hence the restriction of its use to quantities needed for beneficial purposes, as with such husbanding of the supply there is yet not sufficient to meet the increasing demands.

6. The claimant is entitled to a reasonable time after he has diverted and carried the water to the place of use in which to make the actual application to the contem-

plated useful purpose; the prime requirement being that he must use reasonable diligence in making the application, the attendant and surrounding circumstances being considered. We quote again from Mr. Justice LORD, in *Simmons v. Winters*, at page 42: "If the amount of water appropriated is within the given beneficial purpose for which it was taken, no more than is necessary to irrigate the lands contemplated to be reduced to cultivation as soon as can reasonably be done, although more than can be beneficially used for the present, it is nevertheless a valid appropriation." See also *Hindman v. Risor*, 21 Or. 112 (27 Pac. 13). In *Conant v. Jones*, 3 Idaho (32 Pac. 251), the court say: "A person who complies with the law as to locating and conducting the water to the point of intended use has such time as he may need or require, using ordinary diligence in getting his land into cultivation, to make application of such water to the intended use; such time, at least, as is reasonable under all the circumstances of the case." See also *Moss v. Rose*, 27 Or. 598 (50 Am. St. Rep. 743, 41 Pac. 666). In this case the defendant had cleared off sagebrush, and reduced to cultivation 100 acres out of 160, during a period of seven years, and was still engaged in clearing up the balance for the purpose of agriculture, and it was held, under the circumstances surrounding the case, that he was exercising reasonable diligence. And in *Cole v. Logan*, 24 Or. 304 (33 Pac. 568), Mr. Justice MOORE says: "As he (defendant) adds to the area of his cultivated land, he may increase the amount of his diversion until he has acquired the quantity necessary to properly irrigate the whole tract, and any subsequent appropriator diverts the water subject to such prior claim. To entitle the defendant, however, to the benefit of such an appropriation, he should, within a reasonable time, apply the water to such beneficial use. As fast as he can reasonably put his homestead

into cultivation, he is entitled to divert and use the water for that purpose." These authorities are sufficient to show that the proposition is settled in this State.

7. Now to return to the contemplated use or the object for which the claim of appropriation is made: After a completed appropriation, the appropriator may sell and convey his lands in connection with which the appropriation was made, and the water rights acquired thereby will pass appurtenant to the land. And this is so even where possessory rights to the public lands, the title to which has not yet been acquired from the government, is transferred by delivery of possession without deed or other writing: See *Hindman v. Rizor*, 21 Or. 112 (27 Pac. 13), and *Low v. Schaffer*, 24 Or. 239 (33 Pac. 678). The ruling under the facts of the former of these cases would seem to imply that if the party who initiated the appropriation had not yet completed it when the transfer of the possessory title to which the water right was appurtenant took place, that his successor would then complete the appropriation. The point, however, was not specially made, but we think it must be conceded that such would be the case. Suppose A is the owner in fee of a tract of land, or of a possessory title thereto, under the government, and initiates a water appropriation for contemplated use for the irrigation of such tract by proper notice, and actual diversion and conveyance to and upon the land, but, before he has a reasonable time in which to apply all the water needed to the use designed, he conveys the land with his water rights thus acquired to B, surely B could complete the appropriation by reducing the remainder of the land to cultivation, and applying the water to the irrigation thereof—that is, to A's contemplated use. In this instance, B, having acquired A's initiative right, makes the application in his stead, but to the object in connection with which A designed the use. Take another case. Sup-

person makes a diversion for a contemplated use upon White Acre, which he owns, and afterwards, and before he has completed his appropriation by actual user of all the water of his appropriation needed for the cultivation of White Acre, he purchases Black Acre, of like dimensions, and requiring a like quantity of water for its cultivation, and thereupon he abandons White Acre, and uses the water from Black Acre: can he thus complete his appropriation? It would seem reasonable that he could, although upon this proposition we have found no adjudicated cases. If such is the case, here is a change of the object in connection with which the use was primarily designed. However, in either case, the object was primarily the property of the appropriator.

8. After an appropriation is completed, it is settled that there may be a change of the place of use: See *Wimer v. Shivers*, 27 Or. 1 (50 Am. St. Rep. 685, 39 Pac. 6). Even a sale or transfer of the whole or a part of the appropriation may then be made, either in connection with or separate and apart from the land, and the purchaser may use it for an entirely different and distinct purpose: *Drake v. Earlhart*, 2 Idaho, 716 (23 Pac. 541); *Strickler v. Colorado Springs*, 16 Colo. 68 (26 Pac. 313, 25 Am. St. Rep. 215).

9. Mr. Pomeroy, in his work on Water Rights, § 47, as touching the methods by which an appropriation is effected, asserts the following proposition: "The very object of his (the appropriator's) appropriation may be to conduct the water from the stream, through a ditch or canal, across the intervening public lands, to the tract which he possesses as a mining claim, a farm, or a mill, or even to sell and dispose of the water thus conducted, through the canal to other parties, who use it for like purposes on their own 'claims' or tracts of land." And Mr. Kinney states the proposition in very much the same

language. See Kinney on Irrigation, § 156. No authorities are cited in support of the text. The language here used by the learned authors, that the very object of the appropriation may be to sell and dispose of the water to other parties, who may use it for like purposes on their own claims or tracts, is only reconcilable with the idea that the contemplated use may be for other persons not concerned in the initiation of the appropriation, as they are discussing the methods of appropriation, not of the property rights after a completed appropriation, nor of a sale or disposal of the use while the appropriation is in process of acquirement. And we have seen that there can be no appropriation without actual application to the contemplated use. Mr. Kinney, in a succeeding section (§ 171), in a summary of his chapter upon "Methods by which Appropriations of Water may be Made," says: "At the very inception of a valid appropriation of water from a natural stream or lake, there must be a bona fide intention upon the part of the one attempting to appropriate the water to apply the same, when his appropriation is completed, to some of the beneficial or useful purposes." Then, after stating the office of the notice and the necessity of diversion, he says: "All the water, when so diverted, must be applied to some one of the beneficial or useful purposes." Mr. Pomeroy is also in accord with this view, although he does not state it so clearly. In this statement of the rule we find no element which requires the appropriator to make the contemplated use in connection with lands or property of his own, and the rule thus stated is complied with when the appropriator's contemplated use is to work the mines, run the mill or irrigate the land of another. In *Simmons v. Winters*, 21 Or. 35 (28 Am. St. Rep. 727, 27 Pac. 7), Mr. Justice LORD says: "While a settler cannot appropriate more water from the public domain than is necessary to irrigate his

land, nor any to irrigate lands which he does not intend to cultivate, nor own or hold by possessory title." and from this language it is argued that the rule goes farther than as stated by Mr. Kinney, and requires the appropriator to possess or own the lands in connection with which the contemplated use must be wrought out by a physical application thereto of the water claimed, but the language was used with reference to the facts of that particular case. So also language of somewhat similar import was used by HAWLEY, C. J., in *Barnes v. Sabron*, 10 Nev. 243, cited in *Simmons v. Winters*. In each of these cases the settler was making an appropriation for use upon his own lands. The question of a contemplated use elsewhere was not made, so that these cases are not authority here.

The general purpose of an appropriation is to utilize the water in the arid regions, where the supply is limited, for the development and advancement of beneficial industries. In many localities where the water is difficult of diversion, and the expense considerable in conducting it to the place of use, if individual landholders, or even an aggregation of them, were required to make the appropriation for use upon their own possession, these general purposes would be entirely defeated simply for the reason that such holders could not bear the burden of making the appropriation. In such cases other persons possessing capital are often willing to make the diversion for the benefit of those who have use for the water, but, unless they may contemplate a use which may be applied by the landowner to his possessions, they could not even initiate the appropriation until they had possessed themselves of lands in proportion to the amount of water it is desired to appropriate; so that if the user must be the appropriator, and the appropriator the landholder, the arid regions in many places would remain arid, whereas

otherwise they could be made to teem with fertility. No sufficient reason has been suggested why the contemplated use may not be for and upon the possessions of a person other than the appropriator; the authorities we have seem to support the rule that it can be, and we believe it is correct upon principle. We take it, therefore, that the bona fide intention which is required of the appropriator to apply the water to some useful purpose may comprehend a use to be made by or through another person, and upon lands and possessions other than those of the appropriator. Thus the appropriator is enabled to complete and finally establish his appropriation through the agency of the user.

In Colorado, within the meaning of her constitution, it is held that the appropriation of water consists of two acts: First, a diversion; and, second, the application thereof to a beneficial use, and the latter is declared to be the essential act; hence it is there established that canal companies which are engaged in diverting the water and carrying it to the consumer are to be "regarded as an intermediate agency existing for the purpose of aiding consumers in the exercise of their constitutional rights, as well as a private enterprise prosecuted for the benefit of its owners." *Farmers' High Line Canal Co. v. Southworth*, 13 Colo. 130 (4 L. R. A. 767, 21 Pac. 1028); *Wyatt v. Larimer Irrigation Co.*, 18 Colo. 308 (36 Am. St. Rep. 280, 33 Pac. 144). In effect, the carrier, that is the canal company, stands in the relation of an agent to the user, who must be regarded as the principal. But where a third element is essential to a valid appropriation, consisting of an intent which, by the nature of things, is peculiarly the act of the appropriator, and which must precede all others in the process of appropriation, it would seem that he who designed the scheme and made the diversion was the principal, rather than the user, who applies the result of the

former's labor to his beneficial purpose. But, in whatever capacity the parties to the appropriation may be considered, the result is the same, the water of a public stream is eventually applied to a beneficial use, and the general purposes of such appropriations accomplished. As to who, in general, would own the appropriation when completed, it is not necessary for us to say at this time. We are of the opinion, however, that it is the subject of contract between the person who initiates the appropriation and the user. Nor is such a rule consistent or congenial with the creation and fostering of monopolies in the use of the waters of public streams. "The appropriator cannot withhold the water from a beneficial use. He must be diligent in making the diversion, or else he loses his inceptive right; and reasonably expeditious in making the application to a beneficial use, otherwise his appropriation will be measured by the quantity actually used; and he must not cease to use the waters appropriated, upon pain of suffering an abandonment. And going with all this is the primordial condition that when not using he must suffer others to use."

10. Tested by this understanding of the law, let us examine the plaintiff's appropriation. Mallett, Adams, and Lee contemplated a use, not only to be applied by themselves, but by such others as might come in under their ditch. They had in mind some persons with whom they had arranged to join them in the new settlement, should they find a suitable locality; and they expected others to come, as they did subsequently, some of whom they brought in themselves. Indeed, the very object of the scheme was to induce immigration and settlement, which they expected to accomplish by diverting the water, and conveying it to such localities as would be convenient for use, with a purpose of developing the appropriation with the aid of such other settlers as would apply the use.

They had a reasonable expectation that there would be a demand for water as soon as they could convey it to a convenient place for the intended use, and in this respect the scheme could not be said to be merely speculative, impracticable, or visionary. Their original scheme comprehended the building of the ditch as far as the Dunbar place or tap. This is shown by the fact that their survey comprehended only that portion of the ditch. They refused to build the Morfitt extension, but allowed him to construct it, and conveyed to him an interest in the main or original ditch. But it was no part of the original design to carry the water down for the use of Morfitt or other persons convenient to such extension, and the same may be said of the Danielson extension. It was incumbent upon Mallett, Adams, and Lee to begin and construct the works and appliances necessary to a diversion and conveyance of the water to the place of use with all due and reasonable diligence. This they did, and accomplished their purpose in this respect in 1884. The fact that Lee dropped out could make no difference. Mallett and Adams carried forward the enterprise as it was conceived and had been entered upon by all the parties. It was also incumbent upon them to have at the time, or approximately with the time of completing such works and appliances, users ready and willing with sufficient lands and possessions to absorb the appropriation by application to a beneficial use within a reasonable time thereafter. They complied in part with this condition by arranging to divide their appropriation with Blanton, Brown, and others before they had completed the diversion; and at or near the time of such completion they contracted with others for transfers of additional subdivided interests, all of whom began the use of water through the ditch at about or near the time of the com-

pletion of the works and appliances for the diversion and conveyance of the water to the place of use."

In *Irwin v. Strait* (Nev.), 4 Pac. 1215, one Withington had purchased a tract of land, diverted water, and caused it to flow thereupon in April, 1867, but did not begin the proper use of it for irrigating purposes until the spring of 1868. In commenting upon this state of facts, BELKNAP, speaking for the court, says: "We do not think that, in exercising reasonable diligence to appropriate the water, Withington was bound to use it for irrigation during the year 1867. It may have been impracticable by reason of the season, or the difficulties incident to an unsettled country, to have applied the water to irrigation the same spring in which he made his purchase." So it would seem in the case before us that if parties, through the intervention of the appropriators, began the use of water as early as the irrigating season of 1885, there would have been the manifestation of sufficient diligence to prevent the appropriation from lapsing. Whatever diversions were made through the Morfitt and Danielson extensions cannot be considered as within the Mallett, Adams, and Lee appropriations, as their contemplated use did not comprehend an application through either of these extensions; and, as far as any appropriations made by parties through these extensions are concerned, they must be considered as individual appropriations, independent of that made by Mallett, Adams, and Lee, and their inception must date from the time of actual user, or at most from the time of the commencement of use in each individual case. There was an enlargement of the ditch in 1888, and a change of the point of diversion, and at or subsequent to that time parties began the use of water; but the evidence is too meager by which to fix the date and quantity of such appropriations, and hence they can have no place in this investigation. The Nevada Ditch

Company, the plaintiff herein, has acquired various subdivided interests of parties who acquired through Mallett, Adams, and Lee, and to this extent it must be considered as the owner of their appropriation. The stockholders may or may not be entitled to the use of water, as it regards the company, in proportion to the number of shares of stock they hold therein, but the stock is in no way the measure of the appropriation. The change of the point of diversion has worked no one an injury, and hence none can complain: *Cole v. Logan*.

Now as to the quantity of plaintiff's appropriation: There are 1,643 acres under cultivation, which can be traced with reasonable certainty to users who began the use of water in 1883, 1884, and 1885, and 160 acres additional, which may be traced to a commencement in 1886. In 1894 there was irrigated under the two first sections of the ditch about 1,970 acres. Parties have been diligent in reducing their lands to cultivation, and yet at the time of the commencement of this suit had not reclaimed all their holdings as intended or desired. In the opinion of the referee, the capacity of the ditch was 2,082 inches, miner's measurement, 1886, and at that time carried water to its full limit, all which was actually utilized for beneficial purposes. While the capacity of the ditch is not the measure of the appropriation, it nevertheless becomes a potent factor in the ascertainment of the primary intention and establishment of the appropriation, where the evidence touching the use and its inception is indefinite. It requires about one inch of water to the acre for successful irrigation, and when the land is new even more; but upon an average an inch an acre will suffice for the irrigation of the lands under the first two sections of the Nevada ditch, including loss by seepage and evaporation. Thus considered, plaintiff's appropriation would range from 1,643 to 1,970 inches, measured by

actual user. Upon the whole, we think plaintiff should be allowed an appropriation of 2,000 inches of water, miner's measurement, which has for its commencement by relation to August or September, 1881, if not to June 12 of that year, the date of posting the notice.

11. As regards the agency ditches, the Pacific Live Stock Company claims an appropriation prior to the plaintiff. It is contended that the government, having set aside the Malheur Indian Reserve, and its officers and agents having constructed the two Agency ditches, diverted the water thereby, and used it for agricultural and mechanical purposes, making an appropriation of the water for beneficial uses, with like effect as if it was a private individual; and that, having granted the lands upon which the ditches are located and the water was utilized, with their appurtenances, the grant carried with it the appropriation, all which the Pacific Live Stock Company has acquired through mesne conveyances from the government. Actual diversion and use for beneficial purposes will constitute an appropriation; but is such the effect when the government has made the diversion from a public stream, and applied the use to government property, although for beneficial purposes? Prior to September 12, 1872, the lands comprised in the Malheur Indian Reservation were a part of the public domain, but by executive orders of date September 12, 1872, May 15, 1875, and January 28, 1876, they were withdrawn from settlement, and set apart for the use and occupancy of the Snake and Piute Indians. By executive orders of date September 13, 1882, and May 21, 1883, the whole reserve was again restored to the public domain, except 320 acres upon which the old Camp Harney military post buildings were situated. On May 23, 1883, the agency buildings, and sections 3 and 10, Tp. 19 S., R. 37 E., upon which they were situated, were ordered sold, in accordance with

the provisions of sections 2122 and 2123, United States Revised Statutes. The remaining portions of the lands so restored to the public domain were thrown open to settlement. E. L. Bradley having pre-empted the lands in section 4 upon which the heads of both ditches are located, the government issued to him the usual patent therefor, containing the following conditions and reservations, viz.: "To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging * * * subject to any vested and accrued water rights. for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts, etc." This patent was issued November 26, 1889. T. M. Overfelt purchased the agency buildings, with sections 3 and 10, and on May 9, 1885, a patent was issued to him for these buildings and premises, with like conditions and reservations in every respect as the Bradley patent, except the words "improvements, tenements," are inserted and precede the words "rights, privileges, immunities, and appurtenances."

It has been the policy of the general government from an early date, when the exigencies of the public service required it, for the President, through the instrumentality of executive orders, to reserve such portions and parcels of the public domain from sale and settlement as seemed expedient, and thereby set them apart for public use, and it may be conceded that the President had competent authority for so doing: *Grisar v. McDowell*, 73 U. S. (6 Wall.) 381. It may be predicated of the waters of non-navigable streams upon the public domain, that are not appropriated by the methods cognizant to law, that they are as much the property of the government as the lands

through which they flow: Kinney on Irrigation, § 134. HILLYER, J., in *Union Mining Co. v. Ferris*, 2 Saw. 176 (Fed. Cas. No. 14, 371), says: "A stream of water is a part and parcel of the land through which it flows, inseparably annexed to the soil. * * * The government, as proprietor of the land through which a stream of water naturally flows, has the same property and right in the stream as any other owner of land has, be it usufructuary or otherwise." See also *Vansickle v. Haines*, 7 Nev. 249. In the *Mining Debris Case*, 9 Sawy. 492 (18 Fed. 753), SAWYER, C. J., says: "As owners of the public lands, the United States, like any other owner, could sell them in large or small quantities, and convey a fee simple title to their grantees, or could lease them, or reserve them from sale, or grant a limited estate, subject to easements granted to others. * * * They could do all this with their own lands, held in the character of proprietor, merely as the public lands are held." In short, the government can deal with its lands as other land proprietors can deal with theirs. In the Pacific Coast states congress has recognized the privilege of private citizens to acquire usufructuary interests in the waters of public streams, independent of riparian ownership. This is but one way, however, of disposing of the public domain. A new and peculiar right is carved out of it, and settled upon private persons, either in their individual or corporate capacity. Now, if such an estate may be carved out of the public domain for an individual, it may be reserved by the general government, but the waters of non-navigable streams are part of such public domain, and hence the property of the government, which may lay hold of and use them, without taking any of the steps made necessary to obtain an usufructuary interest therein by private individuals. But if it would prevent individuals from acquiring interests by prior appropriation, it would seem that there should be a

reservation made of such waters either by act of Congress or some executive order. Such has not been the case here. The most that can be predicated of the acts of the government and its officers and agents, in the diversion and use of waters in connection with the agency lands, buildings, and machinery, is that it was a reservation for a public use, not an appropriation for a beneficial use in that sense, although actually used by the government for beneficial purposes, which was also a public use. It was a use the government could employ so long as it saw fit, but it is not clear how a public use could become appurtenant to the soil so as to pass with it to a private individual.

12. The public use which the government employs, and the usufructuary interest acquired by the individual by appropriation, are two distinct and different things; the latter may and does pass appurtenant to the soil, but the moment the government parts with its domain to a private individual the public use is abandoned, unless a like use is by special and competent stipulations passed to him by his grant. It is not claimed that such was the case here. But when the reserve was thrown open to sale and settlement the reserved lands were thereby restored to the public domain, and the public use abandoned, and such would surely be the effect as it relates to any reservation of the waters of such domain for a like use. This, of course, proceeds upon the assumption that the use made of the waters by the officers and agents of the government had the effect of a formal withdrawal thereof by competent authority under the government, but we do not decide that such was in reality the effect of such use. Such we think would be the effect of a restoration to the public domain, and the ordinary patent would not carry with the lands the public use made of the waters upon such lands as an appurtenant thereto.

13. But if we are mistaken in this view of the question, there is another matter connected with the transaction which is fatal to the Pacific Live Stock Company's claim. It derives its title through patent from the government, which is a grant "subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts." This is an implied recognition of such rights of prior appropriators as had at the date of the patent been established, and a direct transfer expressly subject to such rights. And the patentee, and, *a priori*, his successor in interest, can take no larger estate than the government has been pleased to grant: Kinney on Irrigation, § 148. So that the company is especially estopped by its muniments of title from claiming as a specific grant from the government, whether as an appurtenant or otherwise, the usufruct of the waters of the Malheur River and its tributaries, as against any and all persons who acquired rights as prior appropriators of the waters of such streams before the issuance of the patents to Bradley and Overfelt. The addition of the words "improvements and tenements" in the Overfelt patent cannot enlarge the grant, except in so far as is quite apparent from the incidents and the patent itself that the government meant to pass the title to the agency buildings as well as to the land. In this view of the matter, the Pacific Live Stock Company must depend for its water rights upon such appropriation as was initiated by Overfelt & Co., after possession of sections 3 and 10 was surrendered to them by the government. It appears that they took possession in April, 1885, prior to the issuance of the patent, and that they at once repaired both these ditches, and began the use of water through them for useful purposes. If such was the case, the incep-

tion of the Pacific Live Stock Company's appropriation antedates the patent to Overfelt, and was a right acquired independent of such patent, and such a right as one holding merely the possessory title to government lands might acquire. But even the inception of the right, whatever it may be, cannot take an earlier date than April, 1885, which is long subsequent to the acquirement by plaintiff of its appropriation, and hence is subordinate thereto.

As concerns the Gillerman-Froman ditch, it has been suggested that the appropriation made by means of it had its inception with the Rinehart survey in 1877 or 1878, but Rinehart did not follow up the survey with the construction of the ditch and diversion of water, nor is there any privity of interest shown between him and the Gillerman-Froman people, so it is plain there is no merit in the suggestion. In the absence of such privity the Gillerman-Froman appropriation is clearly subsequent in time to that of the plaintiff.

For the Malheur Farmers' Irrigating Ditch Company it is claimed that its appropriation had its inception with the Osburn surveys in 1880, and the posting and recording of a notice of appropriation claiming 5,000 inches of water a mile and a half above the head of its ditch. But Osburn and Limeberger did not exercise reasonable diligence in making their diversion, and there is no relation between their attempted appropriation and the one which the company now possesses. Hence its appropriation is also subordinate to plaintiff's.

Eastman Bros. & Ballentine acquired no rights to their appropriation earlier than 1884, nor did the Sand Hollow Ditch people prior to July, 1885. The Warm Spring Valley ditch was constructed without notice in 1888, and it is not claimed that any appropriation was made through the Harper's Ranch ditch earlier than April, 1883. So

that all these appropriations are subservient to that of the plaintiff.

These considerations lead to a modification of the decree of the court below, and a decree will be entered here establishing the plaintiff's appropriation of 2,000 inches of water, miner's measurement, and enjoining all the defendants who are parties to the appeal from diverting any of the waters of the Malheur River until the plaintiff receives the amount of its appropriation. The case will be remanded to the court below, with directions to carry the decree into effect.

MODIFIED.

Argued November 10; decided December 21, 1896.

STATE v. MARTIN.

(47 Pac. 196.)

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34	4
30	108
36	204

CRIMINAL LAW—ABATEMENT OF APPEAL BY DEATH.—An appeal from a conviction of a crime abates on the death of the defendant, and it cannot be prosecuted to a final determination by the personal representatives of the accused, even though the abatement leaves in force a judgment for costs, enforceable against his estate.

Motion to abate an appeal on account of the death of the defendant. The personal representatives of the deceased appeared to resist the motion, because it would leave in force against the estate a judgment for costs in favor of the State.

APPEAL ABATED.

For the motion there was an oral argument by *Mr. Cicero Milton Idleman*, Attorney-General.

Contra there was an oral argument by *Mr. Alfred S. Bennett*.

Opinion by MR. JUSTICE BEAN.

The defendant, E. Martin, was convicted and sentenced to the penitentiary for the crime of forgery. From this judgment he appealed, but died before the cause could be heard in this court. His death having been suggested, the attorney-general moves for an order abating the appeal. This motion must be allowed. There is no right of appeal in any case unless given either by statute or some rule of common law; and we are advised of no common law rule or statutory enactment authorizing the prosecution of an appeal in a criminal case in this State by the personal representatives of a deceased defendant. At common law such an appeal could be brought by the heirs or executors to reverse an attainder of treason or felony (Bishop's Criminal Procedure, § 1363); but this was upon the principle that the effect of such attainder was to work the forfeiture of the estate, and thereby take from the heirs or executors, and give to the government, property belonging to them as representatives of the deceased person, and for this reason it was held that they had such an interest in the forfeited estate and judgment as entitled them to prosecute the appeal in their own right. In no other instance, it is believed, can there be found affirmative authority in the common law for the prosecution of an appeal in a criminal action by the representatives of a deceased defendant; and, since our constitution provides that "No conviction shall work corruption of blood or forfeiture of estate" (Art. I, § 25), it is clear the right to prosecute this appeal cannot be supported under the common law, and, as there is no statute authorizing such a procedure, it is manifest that the cause cannot now be heard. Indeed, to take any further proceeding in this case would be a vain and useless thing. If the appeal is to be heard, we must either affirm the judgment and order its execution, or reverse it and order a new trial; but in neither case could the judgment be carried into effect.

because there is no person in existence upon whom it could operate. If affirmed, it could not be enforced against the personal representatives of the deceased by confinement during the term of the sentence; and, if reversed, there is no person to try. In a civil action the judgment may be enforced by or against the personal representatives of the parties, and hence, under the statute (Hill's Code, § 38), the action does not abate by the death of a party if the cause of action survive or continue. But in a criminal action, the sole purpose of the proceeding being to punish the defendant in person, the action must necessarily abate upon his death.

It is argued, however, that there is a judgment in this case for costs which can be enforced against the defendant's estate, and for that reason his personal representatives have a right to prosecute this appeal. But costs are only incidental to the real question in issue, and are recovered or not, according to the determination of such question. In criminal proceedings they result solely as a legal consequence from the judgment of conviction, and, unless the judgment itself can be reviewed on appeal after the death of the defendant, it is manifest that a mere incident thereto cannot be so reviewed. The questions involved in this case were directly presented in *O'Sullivan v. People*, 144 Ill. 604 (32 N. E. 192); and *Herrington v. State*, 53 Ga. 552. In each of these cases the defendant died after the cause had been submitted to the appellate court for decision, and the right to continue them in the name of a personal representative of the deceased was denied; the courts refusing to proceed any further in the matter, or pronounce any decision in the cases. It follows that this appeal must abate, and it is so ordered.

APPEAL ABATED.

Argued June 29; decided October 19, 1896; rehearing denied.

CLARNO v. GRAYSON.

(46 Pac. 426.)

1. UNILATERAL CONTRACTS—OPTION TO PURCHASE—CONSIDERATION.

—Entering into possession of a mine by an intending purchaser and the expending of money and labor in operating and developing it under the terms of an option to purchase constitute a sufficient consideration to support the option, and render it irrevocable within the time limited for completing the purchase (*Stinson v. Hardy*, 27 Or. 584, cited and followed), and it is no objection that the option is unilateral: *House v. Jackson*, 24 Or. 89, cited and followed.

2. TIME AS A NECESSARY ELEMENT IN AN OPTION—VENDOR AND PURCHASER.

—It would seem that if a given condition is a prerequisite to the acquirement of a right to the subject matter of a contract, time ought to be considered of the essence of such a contract, if the performance of the condition is a matter optional with the purchaser, and the contract has been fairly entered into with a view to accord an option only.

3. SPECIFIC PERFORMANCE—WAIVER OF CONDITION PRECEDENT.

Acts or declarations on the part of the owner which amount to a rescission or repudiation of an option for the purchase of land, and an absolute and positive denial of any and all duties under it, may render unnecessary strict performance by the purchaser before suit to secure specific performance, upon the ground that it would be a useless and vain thing to tender the stipulated performance, knowing that it would not be accepted.

4. SPECIFIC PERFORMANCE OF OPTION.

—An owner of land who would insist upon strict performance by a prospective purchaser as a condition precedent to an action by the latter for the specific performance of an option to purchase must not himself be the cause of the breach.

5. VENDOR AND PURCHASER—ABANDONMENT OF OPTION.

—The mere executing of a general assignment for creditors by the holder of an option to purchase real estate will not be considered as an abandonment of the right to complete the transaction, where the assignment was resorted to for the purpose of dissolving attachments that were impeding the completion of the purchase, and the individual stockholders were ready to support the assignee in carrying out the terms.

6. TENDER—SPECIFIC PERFORMANCE.

—Where the giver of an option on real estate enters and takes possession of the property before the expiration of the time limited in the option, and in violation of its terms, his conduct will not be considered such a repudiation of the option as to excuse a tender under the provisions of the contract, where it is mutually understood that the holders of the option may complete the purchase as stipulated; such conduct by the maker of the contract may excuse punctuality of performance, but will not excuse performance entirely.

30	111
34	57
30	111
38	456
30	111
43	804
30	111
44	478

7. **IDEM.**—The giver of an option to purchase real estate took possession of the premises in violation of the option he had given, and during his holding derived a profit from it. The holder of the option sued for specific performance, but made no tender of the purchase price, claiming that the defendant had made more profit during his wrongful possession than the amount due on the bond. *Held*, that in the absence of an accounting, or a refusal to account, the purchase price must be tendered as a condition precedent.
8. **PLEADING WILLINGNESS TO PERFORM—SPECIFIC PERFORMANCE.**—In a suit to enforce the terms of a contract to sell, an allegation that plaintiff stands “ready, willing, and waiting to perform” is insufficient; the tender should be to do all the things and comply with all the conditions necessary to complete the acquisition of the rights claimed.
9. **EQUITY JURISDICTION—SPECIFIC PERFORMANCE.**—In a suit for specific performance by the holder of an option to purchase a mine in operation an equity court cannot decree that plaintiff be put in possession and that the time for purchasing be extended for a period equal to the time the property has been withheld by the wrongful act of the vendor, because it would be making a new and different contract, and because it would require a protracted supervision over a complicated and technical matter.

From Baker: ROBERT EAKIN, Judge.

This is a suit by Francis Clarno, as assignee of the Virtue Mining Company, a private corporation, against George W. Grayson, and it is based upon a certain contract and its modifications touching the Virtue Mine, situated in Baker County, Oregon. On the 19th day of November, 1891, the defendant, Geo. W. Grayson, being the owner of the mine in question, entered into a contract under seal with one William C. Ralston, of San Francisco, California, wherein, for the consideration of \$10 in hand paid, the said Grayson agreed “to give to the said party of the second part (Ralston) a working bond on the aforesaid mining claim, with the privilege of purchasing said claim on the following conditions: (1) The said party of the second part shall be allowed, on the signing of this agreement, without payment, to enter into full possession of said mining claim, for the purpose of working and developing the same, and extracting ores; provided, however, that all such development work must be done in a proper,

workmanlike manner, and not to the injury of said mine, or to the interest of the party of the first part; and provided, further, that the party of the second part must post notices necessary, according to law, to hold the said party of the first part free from the payment of any expenses or costs which the said party of the second part may incur during his working of said mine. (2) If, within one year and twelve days from the date of this agreement (to wit: the 1st day of December, A. D. 1892), the said party of the second part shall pay to the said party of the first part the sum of forty-five thousand (\$45,000) dollars, legal coin of the United States, then and on that condition the said party of the first part agrees to deliver to said party of the second part a good and sufficient deed, conveying the said mining property to the said party of the second part." The third paragraph is superseded by paragraph 4 of the modified contract, and hence is omitted. "(4) If, within a year and twelve days from the date of this agreement (to wit: the 1st day of December, 1892), the said party of the second part does not pay to the said party of the first part said sum of forty-five thousand (\$45,000) dollars, legal coin of the United States, then this agreement to be null and void and of no effect. Time is of the essence of this agreement." Then, after giving a description of the mine, the contract proceeds: "Together with all the dips, spurs, and angles, etc., and also all and singular the tenements, hereditaments, and appurtenances thereunto belonging. Also the hoisting works and improvements connected therewith; and also all that certain twenty-stamp-power quartz mill situate on the aforesaid Virtue Mine."

Subsequently this contract was assigned by Ralston to A. V. Oliver, and by his and mesne assignments became the property of a corporation of Stockton, California, known as the Virtue Mining, Milling & Development

Company; all with the written assent of Grayson. The Stockton company entered into possession of the mine, and expended a considerable sum of money in equipment and development work, and on August 16, 1892, entered into a modified agreement with Grayson as follows, omitting preamble: "Now, therefore, in consideration of the premises, and of a valuable consideration given by the party of the second part to the party of the first part, the party of the first part agrees to extend the time on said bond nine (9) months, to wit: the 1st day of September, 1893, under the following conditions, to wit: (1) It is agreed and understood that all the conditions, except the limitation of time, named in the original bond between George W. Grayson and William C. Ralston (reference being had thereto), shall remain in force until the 1st day of September, 1893; said original agreement, to which reference is had, being dated November 18, 1891, and together with all its assignments and transfers, duly signed and acknowledged, being of record in the records of Baker County, Oregon, in Book of Deeds, volume U, page 268. (2) It is further agreed and understood that in case the said party of the second part should not complete the purchase of said mine in accordance with condition No. 2 of the said original agreement, then and in that event it is expressly agreed and understood that any bills, mining, or hoisting works, and all improvements of every kind soever, erected and used by the said party of the second part in connection with the working or developing of said mine, shall become absolutely the property of the party of the first part. (3) It is further agreed and understood that condition No. 3 of said original agreement be cancelled. (4) It is further agreed and understood that the net proceeds, if any there be, of all the ores extracted from said mine or removed from the dump belonging to the said mine, during the existence of this agreement,

after deducting all costs incidental to mining and milling the same, and extracting the gold therefrom, shall be turned over monthly, on the 15th day of each month, to the party of the first part, or his agent. Should the purchase be completed in accordance with the conditions of this agreement, to wit: by the payment of forty-five thousand (\$45,000) dollars on or before the 1st day of September, 1893, then and in that event the said party of the first part agrees to consider the amounts so received, if any there be, as part of the purchase price; but should the purchase not be completed by the payment of forty-five thousand (\$45,000) dollars on or before September 1, 1893, then and in that event it is fully agreed and understood that any and all of these amounts so received by the party of the first part, from the net receipt of all such ores extracted or worked from the mine or dump of said property by the said party of the second part, shall belong absolutely to the said party of the first part, without recourse, and the said party of the second part hereby waives all claim to the same. And it is further agreed that the expenses above referred to as incidental to mining and milling of said ores shall be reasonable, and to the satisfaction of the said party of the first part, and that at the end of each month the said party of the second part shall render to the said party of the first part, or his agent, a full and exact statement of all the ores extracted from said mine during said month, with complete detailed statement of the workings of the same. And it is further agreed and understood that at any time during the existence of this agreement the party of the first part, or his agent, may at any time have full access to the said property, and to the books of the corporation, for the purpose of examining the same and verifying any accounts. (5) It is further understood and agreed that if the said party of the second part should fail to turn over monthly on the

15th day of each and every month to the party of the first part, or his agent, the net proceeds of all the ores extracted from said mine, or removed from the dump belonging to said mine, or shall fail to work said mine for any period of sixty (60) days, or shall fail to pay said sum of forty-five thousand (\$45,000) dollars, as provided, on or before the 1st day of September, 1893, or shall at any time during the continuance of this agreement remove, or attempt to remove, any of the improvements whatsoever erected or used by the said party of the second part in connection with the working and developing of said mine, or should refuse the party of the first part, or his agent, access to the said property, or to the books of the said party of the second part, for the purpose of examining the same and verifying any accounts of the party of the second part, or shall fail to perform any of the conditions or provisions of the said bond or of this agreement, as therein and herein provided, then this agreement shall immediately terminate and end, and the party of the first part shall be entitled, without notice and without demand, to take immediate possession of all the property agreed to be sold under said bond, and under this agreement. This agreement is executed in duplicate. Time is of the essence of this agreement."

The complaint, after setting out the contract, its modification and transfers, shows that subsequent to the modification it was transferred by the Stockton company and mesne assignments to the Virtue Mining Company, a corporation having its principal place of business at Portland, Oregon, and that said last-named company took possession of the mine, and, at great expense for machinery and labor, equipped, worked, and developed the same, all which was incurred in good faith; that the defendant, about June 9, 1893, wickedly, fraudulently, and unlawfully, and without color of right or authority,

ousted the said Virtue Mining Company, and took possession of said mine, with all its appurtenances and improvements, and has ever since unlawfully withheld the same from said company and plaintiff, although possession has been repeatedly demanded of him; that he so entered into the possession of said mine with the purpose and intent to hinder and delay the company in the operation thereof, and prevent it from paying the price agreed upon for its purchase on the 1st day of September, 1893, and has so prevented it, as otherwise it would and could have made such payment at the appointed time; that defendant has, since he took possession, extracted from said mine gold bullion to the value of \$75,000, and has damaged the plaintiff in the further sum of \$48,000, by preventing it from operating said mine and running the mills and machinery to their full capacity. The company assigned all its property about May 29, 1893, for the benefit of its creditors, and the plaintiff was appointed assignee. The facts touching the assignment are shown, and it is then further alleged "that he (plaintiff) is ready, willing, and waiting to perform said contract on the part of said corporation," * * * and that "he does not tender the said balance of purchase price because Grayson, prior to the expiration of said contract, had taken vastly more out of said mine, in gold bullion, than the amount thereof, and he now holds the same, and refuses to turn any part of it over to the plaintiff, or to account for it in any way; that he is also justly indebted by said damages in a sum much larger than said balance; that he is a resident of the State of California, and is now insolvent, and plaintiff could not collect from him said sums or either of them if recovered as damages." The issues tendered by the answer are: First, the right of the Virtue Mining Company, under the contract, to assign to Clarno without the assent of Grayson; second, whether said company, on

or about the 1st of June, 1893, abandoned and forfeited the right to the possession, and to work and operate the mine, by reason of certain alleged acts, such as attempting to place plaintiff, a stranger to said contract, in possession without the consent of Grayson; failing and refusing to prosecute development work in a proper and workmanlike manner, or to extract ore as provided by the contract, or to account for and turn over the net proceeds, by not making the operating expenses reasonable, by failing to render a monthly statement of all ores extracted, with a detailed statement of the operation of said mine, and by refusing to turn over such proceeds to defendant on the 15th day of each month; and, third, whether plaintiff has lost the right or privilege accorded by the contract of purchasing the mine by reason of the alleged failure to tender or pay the purchase price of \$45,000 on or before September 1, 1893. Decree for defendant, and plaintiff appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Messrs. Dell Stuart and Thos. O'Day*.

For respondent there was a brief and an oral argument by *Messrs. T. Calvin Hyde, F. L. Moore, and Robert M. Clarke*.

MR. JUSTICE WOLVERTON, after stating the facts in the foregoing language, delivered the opinion of the court:

1. We had occasion to construe a contract similar to the one under consideration in *Stinson v. Hardy*, 27 Or. 584, 594 (41 Pac. 116), wherein it was determined that, after taking possession, making improvements, and incurring expenditures, the second party acquired a license coupled with an interest, exclusive and irrevocable. By

the terms of the contract under consideration, and when we speak of the contract we have reference to it in its changed condition, as it is conceded by the parties that it has been regularly modified, it is conditioned that the party of the second part shall be allowed, on signing the agreement, without payment, to enter into full possession of said mining claim for the purpose of working and developing the same and extracting ores, with a proviso, followed by the conditions upon which the work of development and the extraction of ores shall be carried on or prosecuted. The contract contemplates the expenditure of labor and money by the second party, and when entry was made thereunder, and such expenditures incurred, it became a license coupled with an interest, exclusive in the second party, and irrevocable, except under the express conditions following the proviso, so that possession could be maintained by the second party by observance of its provisions throughout the entire limitations of the contract. Coupled with this license, the second party is granted the privilege of purchasing the mine for \$45,000, payable on or before the 1st day of September, 1893. Provision is made whereby the net proceeds, if any, arising from the operation of the mine, should be paid to the first party, and, in the event of the purchase being consummated on or before September 1, 1893, such proceeds were to be considered as part of the purchase price; but it is further conditioned that in the event the \$45,000 was not paid on or before the date named, such net proceeds as were thus received by said first party should belong to him absolutely, and all claim thereto waived by the second party. When he assumed to operate the mine, the said second party was required to observe the conditions prescribed by the contract as to the manner in which he should proceed, or by disregarding them incur the risk of terminating the agreement. The conditions of the con-

tract did not obligate him to pay the \$45,000 named as the consideration for the mine, or any part of it. It was left optional with him to consummate the purchase or not, as he might elect. The contract, therefore, is in that respect unilateral, as it is binding in the one direction only. The entry and outlay of labor and money in operating the mine, especially as it is stipulated in the contract that in case the purchase was not completed all improvements made should become the property of the first party, constituted a sufficient consideration to support the option, and rendered it irrevocable within the time limited: *House v. Jackson*, 24 Or. 89 (32 Pac. 1027); *Hall v. Center*, 40 Cal. 63; *De Rutte v. Muldrow*, 16 Cal. 513; *Willard v. Taylor*, 75 U. S. 557; *Corson v. Mulvaney*, 49 Pa. St. 98 (88 Am. Dec. 485); *Schroeder v. Gemeinder*, 10 Nev. 355; *Souffrain v. McDonald*, 27 Ind. 269; Pomeroy's Specific Performance of Contracts, § 169 and note. To this point there is but little difficulty.

2. By its terms, time is expressly made of the essence of the contract, but, notwithstanding, it seems to be contended that, treated and considered as an equitable proposition, in reality it is not; that possession having been given, and large expenditures of labor and money having been made by the contemplated purchaser upon the faith of the contractual relations, the time-essence clause is thereby made to stand as a dead letter, which equity will not enforce. It was perfectly competent for the parties to introduce such a stipulation, and they must be held to be bound by it, whatsoever may be its legitimate effect, either at law or in equity. It was early intimated by Lord Thurlow, in *Gregson v. Riddle* (cited in *Seton v. Slade*, 7 Ves. 268), that time could not, in equity, be made of the essence of a contract, even by positive stipulations; but this idea never came to be judicially established, and it is now firmly settled that time may become of the essence

of the contract in several ways: By stipulation of the parties, by the nature of the subject-matter of the contract, and, where not originally essential, by delay upon the one side, and reasonable notice upon the other, to complete: Pomeroy's Specific Performance of Contracts, § 382. And by one line of decisions it is held that time is of necessity an essential element in all unilateral contracts, but another line asserts that, while it is material in such contracts, it is not strictly essential: *Id.*, § 387. It is somewhat difficult, and perhaps impossible, to harmonize the discordant opinions relating to the effect of such contracts, and whether or not time is inherently and necessarily an essential ingredient. Mr. Pomeroy attempts to reconcile the conflict by the following suggestions: "Where the contract is really an offer on one side, with a provision that this offer must be assented to and accepted, when a mere acceptance is contemplated, or payment must be made, when payment was the act of acceptance contemplated, at or before a specified date, then, of course, the act of assent or of payment must be done within the prescribed time, and time is from the very form of the contract essential." "If, however, the offer or option * * * is not made to depend upon an acceptance or payment at or before any particular or specified day, but simply calls for an assent and acceptance, or for a payment, as the case may be, and is silent with respect to the time within which such acceptance or payment must be made, then, so long as the offer remains unrevoked, it is enough that the acceptance or the payment be made within a reasonable time." In such a case time is material only, and not in the true sense essential: Pomeroy's Specific Performance of Contracts, §§ 387, 388.

Mr. Freeman, in his note to *Wells v. Smith*, 31 Am. Dec. 278, suggests that the cases could be harmonized by establishing the rule "that if the performance of an

act at a time stated be made by the contract a condition precedent to the acquisition of any right thereunder, then that time is of the essence of the contract. * * * If, on the other hand, some right has already been acquired under the contract, as where part of the purchase price has been paid, or the purchaser has taken possession with the assent of the vendor, and made permanent and valuable improvements, any provision looking to the forfeiture of the contract will be treated as a condition subsequent, and relieved against, if its enforcement be shown to be inequitable." In support of the rule, the learned annotator cites 2 Leading Cases in Equity, 1134, wherein is found White & Tudor's notes to *Seton v. Slade*, reported 7 Ves. 265. They say: "It may be inferred from the authorities which have been cited that where the intention manifestly is that payment, or the conveyance of a good and sufficient title, at or before a certain time, shall be a prerequisite without which no right shall vest under the contract, a chancellor cannot make a new agreement for the parties by holding a subsequent tender equivalent to the punctual performance which they have prescribed. Under these circumstances, the case falls within the rule that an executory agreement fails utterly if it be not exactly fulfilled. When, on the other hand, the effect of the contract is to vest an immediate right in the purchaser, which would descend to his heirs, or pass under a general or residuary devise, relief may be given against a subsequent default, which is not willful or injurious." The right which Mr. Freeman refers to as having vested is much broader in its significance than the right Messrs. White and Tudor speak of, such as "would descend to the heirs or pass under a general or residuary devise." The latter evidently restricts the right which must vest by the contract, and which will excuse punctuality to lands or reality, a right in rem, while Mr. Freeman's idea of it

seems to comprehend any right, including such as might be acquired by the contract, regardless of a right in the thing itself. The distinction would appear to be significant. If the contract is such that an equitable conversion has taken place under it, so that equity will regard that as done which ought to be done, then a right in the property has vested, and the case ought to present clear and satisfactory countervailing equities in which a court would declare a forfeiture. But if the right acquired by the terms of the contract is simply a privilege or an option, or a right to acquire a right, or an interest in the subject-matter of the contract, it is then not a question of the forfeiture of any vested right in the property, or a divestiture of title, whether termed equitable or legal, but a question of the enforcement or non-enforcement of a stipulated personal right or privilege. The privilege of acquiring a vested equitable right must be distinguished from the right. The privilege is acquired directly by the contract, but the acquisition of the right, while it is stipulated for under its terms, is dependent upon the performance of a condition. When such a condition is performed, the right vests, and not until then: *Richardson v. Hardwick*, 106 U. S. 254 (1 Sup. Ct. 213).

Now, it would seem that if the performance of a certain condition, such as acceptance of an offer or the payment of a sum of money at or within a certain time, which acceptance or payment is a matter purely optional with the purchaser, is a prerequisite to the acquirement of a right to the subject-matter of the contract, time ought to be considered of the essence of such a contract. Until such a performance, there is not a meeting of minds that the property shall be transferred. The purchaser has not consented to take, nor the vendor to convey. The act to be done is the very thing needful to a consummation of the agreement. It is the special manner indicated for

expressing assent, and the law will not compel an assent. There must be an agreement, without which the law is powerless. He whose duty it is to assent to a condition within a given time, if he would obtain a right, should be held to punctuality in performance, as it would be inequitable to the party whose property rights are dependent upon such an act to be held to a performance for an indefinite length of time, notwithstanding a specific date is agreed upon within which the assent shall be made manifest: *Bullock v. Adams' Executors*, 20 N. J. Eq. 371-374. A mere offer to sell land at a given price within a stated time, if accepted, will constitute a contract, the specific performance of which may be enforced in equity: *Boston & Maine R. R. v. Bartlett*, 3 Cush. 224; *Perkins v. Hadsell*, 50 Ill. 216; *Smith & Fleck's Appeal*, 69 Pa. St. 475. It may, however, be retracted at any time before acceptance. It cannot be contended that such an offer, without an acceptance, will vest an equitable interest in the land in the contemplated purchaser. Now, if we go a step further, and consider an offer based upon a sufficient consideration, with an option to purchase within a given time, the offer cannot be withdrawn within the time. It must remain open until the day for performance by the contemplated purchaser has come and gone; but unless the offer be accepted, or the price paid, that is, the condition be performed upon which the option is granted, is there any greater or more cogent reason why an equitable interest should vest prior to performance in the latter case than in the former? It would seem not. So long as the consideration named is the price of the option, and not to be deemed a part payment for the property unless the offer is accepted in the manner agreed upon, it seems clear that no equitable right could vest. There may be, and perhaps are, instances in which the consideration to support the option is so grossly in excess of its value that the court

may construe the contract as evincing an intention of the parties to accord a present right to the purchaser in the subject-matter, or the party bound may, by encouraging large expenditures, be deemed to have waived strict performance. In such instances provisions looking to a forfeiture might be treated as conditions subsequent, and relieved against, as it would be inequitable not to do so: *O'Fallon v. Kennerly*, 45 Mo. 127. Where, however, the contract is fairly entered into with a view to accord an option only, the stipulated condition for asserting the option must be complied with before there can be mutuality in a contract for the purchase of land, and must be deemed a condition precedent to the vesting of an equitable interest in the subject-matter, and time becomes an essential element, as it is evident that the parties intended it as such. It is said that when the option has been declared, it takes effect as an equitable conversion, by relation back to the date of the original contract: *Kerr v. Day*, 14 Pa. St. 112 (54 Am. Dec. 526); *Ripley v. Waterworth*, 7 Ves. 436; 3 Pomeroy's Equity Jurisprudence, § 1163. But it has been held that this doctrine of relation does not apply as between vendor and purchaser: *Edwards v. West*, 7 Ch. Div. 863. At any rate, there can be no vested interest until the option is declared, whether it relates back or takes effect from the date of performance of the condition. We have discussed this matter much at length because of the fact that a great deal of stress, both in the argument and the briefs, has been laid upon the question whether time was, in effect, the essence of the contract, and, if so determined, whether it had not been waived, and the discussion, we trust, has not been without profit. It is not a question here whether time is of the essence, as all the acts relied upon as constituting a sufficient performance under the circumstances of the case have been performed, or an alleged adequate

performance proffered, and suit instituted prior to the expiration of the stipulated time in which the company might have exercised its option to purchase.

3. The question now before us is one of performance, and whether exact, not punctual, performance has been excused. Much that has been said relative to the necessity for the performance of a condition precedent within the time, where made essential, has application to the quality of the performance which will require a specific performance by the party granting the option. As indicative of the company's desire to purchase under its privilege or option, it was required to perform a condition precedent, that is, to pay \$45,000. No equitable or other estate passed to it in this mine without such performance, unless it was excused by the acts of the defendant, as it could not be compelled to purchase without its assent. Or, as expressed by Mr. Pomeroy, "Where the contract is thus conditional, that is, where it rests upon a condition precedent, until the performance of the condition it cannot be enforced, because until that time there is no true contract." Pomeroy's Specific Performance of Contracts, § 334. It may be said to be well settled that such acts or declarations amount to a rescission or repudiation of the contract, and an absolute and positive denial of any and all duties under it, may render strict performance before suit unnecessary, upon the ground that it would be a useless and a vain thing to tender the stipulated performance, knowing that it would not be accepted. The denial of the right to make the tender, or the positive and unqualified assertion by the party who may insist upon punctuality or exact performance that thenceforth he is not bound—and this state of affairs may be inferred from unequivocal acts as well as direct assertion—is, in effect, a waiver of strict performance, and a notice that the other party may as well proceed in due time to the enforcement

of the obligation, as otherwise no performance could be obtained at his hands: *Brock v. Hidy*, 13 Ohio St. 306; *White v. Dobson*, 17 Gratt. 262; *Maughlin v. Perry*, 35 Md. 352; *Deichmann v. Deichmann*, 49 Mo. 107; *Lowe v. Harwood*, 139 Mass. 133 (29 N. E. 538); *Gray v. Daugherty*, 25 Cal. 266; *Baumann v. Pinckney*, 118 N. Y. 604 (23 N. E. 916); *Brown v. Eaton*, 21 Minn. 409; *Mattocks v. Young*, 66 Me. 459; *Dulin v. Prince*, 124 Ill. 76 (16 N. E. 242); *Mansfield v. Hodgdon*, 147 Mass. 304 (17 N. E. 544).

4. Another proposition insisted upon, which is sound in law and based upon good morals, is that he who would insist upon strict performance must himself not be the cause of the breach. His own wrong can never operate under the sanction of law to his advantage, nor to the injury of another. This may be regarded as fundamental, and no authorities are necessary to support it.

Having premised this much of what seems to be the law touching a construction of the contract under consideration, and the rights and duties of the parties thereto, we will examine the facts as they appear to us to be exhibited from the evidence in the record. By reason of the great volume of the testimony, we can do scarcely more than to state our conclusions without any very extended reference thereto. Prior to December, 1892, the Virtue Mining, Milling & Development Company, of Stockton, California, known herein as the Stockton company, and its predecessors in interest, under the contract with Grayson, had incurred a large indebtedness, which was outstanding in the way of divers demands against the company and its assignors. For some reason, which is not disclosed in the evidence, Grayson had resumed possession of the mine, with its mills, pumping apparatus, and appurtenances. At any rate, he was in the sole possession when he consented, a little later, that the Virtue Mining Company of Portland, Oregon, should enter and assume con-

trol. On December 9, 1893, the Stockton company, by deed, duly assigned its interest in the contract, mine, and appurtenances to one L. M. Robinson, and he, on the 12th, to David Ogilvy, who was then one of the promoters and afterwards president of the Portland company. He with others at the time had in contemplation the incorporation and organization of the company last named, and, as a means of transferring said contract and the interest thereby obtained in the mine, to the company, the deed was made to Ogilvy, for the time being in trust for said promoters, and the company when organized. The company was afterwards, on January 10, 1893, duly incorporated, and in due time organized by its promoters; and on the 9th day of April, 1893, Ogilvy, by deed, assigned to it, as designed by those concerned. As a consideration for the assignment to the promoters of the Portland company, they agreed to pay about \$18,000 of the indebtedness that had been incurred under the contract, and, having thus become interested in the contract, they applied to Grayson for his consent to the assignment, and that they be installed in possession of the mine. The agreement may have been conditional upon their obtaining Grayson's consent, but it is of little importance whether conditional or absolute. Grayson was induced to go to Portland during the last days of December, and at that time consented to the transfer, and gave an order upon Geo. W. Boreman, who was then his agent at Baker City, Oregon, who, later on, about January 6, 1893, put them in possession. Grayson says the conditions upon which he gave his consent were that they would pump the water out of the mine, pay off the old claims, free the mine of attachments and other liens, put up a working capital of from \$20,000 to \$30,000, to meet all liabilities, and work the mine in accordance with the stipulations of the contract, all which was agreed to by the promoters of the

Portland company. It was contended by Grayson's counsel at the hearing that this alleged agreement modified the original contract, and that a failure of said promoters and the company to comply therewith operated as a forfeiture of their rights and privileges under the contract; but no such modification is pleaded, nor is there any assignment of a breach of these alleged new conditions, so that any available breach must be sought for under the original contract, and the modification of August 16, 1892. The promoters deny this alleged agreement, but this much is established: They were to free the mine of water, and otherwise operate it as the contract directed. It was also understood that if at any time they should conclude to abandon the mine, Grayson should be notified so that he might take hold of it at once and prevent it from again filling with water.

Some talk was had as to who should superintend the operation of the mine, Grayson insisting upon the employment of Geo. W. Boreman. N. S. Wight, however, one of the promoters of the Portland company, was appointed, and took charge, when possession of the mine was obtained, and Boreman became foreman under him. Wight continued to act as superintendent until about March 23, 1893, when he resigned, and severed his relations with the company, whereupon Boreman was appointed as his successor, and the latter continued in the office while the company had the management. During all this time, George Walker, who was one of the stockholders and one of the original promoters of the company, had a general oversight of the mining operations, he being present in person during the whole time up to May 26, except perhaps ten days in March. He was the direct representative of the company on the ground, for the purpose of protecting and promoting its interests. On May 26, while the mine was in full operation, some of the mining ma-

chinery was attached in an action begun against the Portland company, presumably upon some of the demands of the old Stockton company. Boreman was put in charge by the sheriff as keeper, but the working of the mine was not thereby impeded. At about the same time Walker attempted to encumber the mills and machinery with a chattel mortgage, but his authority for so doing was denied by the company. Walker went immediately to Portland, leaving Boreman in charge, and the company, upon being apprised by him of the condition of affairs at the mine, determined, by resolution duly adopted by its board of directors at a called meeting on May 29, to make a general assignment for the benefit of its creditors. In pursuance of the resolution, a deed of assignment was made to Francis Clarno, of Portland, the plaintiff herein, which appears to have been acknowledged, and the schedule and list of creditors sworn to, on June 1. The contract with Grayson is scheduled as the only property of the company, and is valued at \$20,000; the liabilities are shown to be \$17,498.77. The deed was filed for record in Multnomah County June 2, and in Baker County on the 3d. No undertaking was entered into, executed, or filed by the assignee until August 26, 1893. Clarno went from Portland to Baker City, arriving there in the forenoon of June 3, and at once notified Boreman of his authority in the premises, and his purpose to take possession of the mine. Boreman at once telegraphed the situation to Grayson, who was then in Oakland, California. Late in the afternoon Boreman went with Clarno to the mine, presumably for the purpose of turning the same over to him, but when they arrived they found the miners had taken forcible possession. A committee had been appointed by them to take control of its operation, and they refused to give Clarno possession, or to recognize the authority of Boreman. I. H. McCord, Boreman's bookkeeper, preceded Clarno

and Boreman to the mine, and, it is claimed, got the miners drunk, and incited them to mutiny against the company and its assignee; but it is not clear from the testimony that such was the case, although McCord was himself drunk, and had a personal encounter with one or more of the men. Grayson, in reply to Boreman's dispatch, sent him the following telegram from Oakland in the afternoon of the same day, which was received at Baker City at ten minutes to seven that evening: "Follow attorney's advice, keep water pumped out; leave for Portland tonight." It appears that prior to, and perhaps at this time, Hon. T. C. Hyde was Grayson's counsel at Baker City.

Grayson arrived at Portland on the 5th, and at once called on Mr. G. Heitkemper, secretary of the Portland company, with reference to the condition of affairs at Baker City and the mine, and a conference of some of the directors and stockholders, and their attorney, Judge Dell Stuart, was arranged and had with Grayson, at which it appears that he was apprised of the fact that they had information from Baker City that Boreman was holding the mine for him, and in pursuance of his direction. Grayson denied that Boreman had any authority for so doing, but declined their request for an order upon Boreman to surrender the mine to them, saying, in effect, that he did not know the condition of affairs; that he would do nothing until he went to Baker and learned the situation, and that he would then make things right. The condition of the company, and the reason for the assignment, was discussed. Grayson went on to Baker City, arriving there on the 6th, and a conference was had with Clarno. Touching what was said at this conference there is conflict in the testimony. Clarno claims he demanded possession of the mine from Grayson, and the latter denies that any direct demand was made, but says the matter was talked

over between them, and that he told Clarno he was not in a position to surrender possession, as the miners were holding it, and that it was useless for him to try to act until they were satisfied. Another meeting was appointed for the following day, but Clarno left for Portland in the evening, and no further consultation was had between them. Afterwards Grayson attempted to get possession from the miners, but they refused to surrender until they had taken out enough gold to pay themselves; but finally they agreed to cease operations on the 11th, and did at midnight of that day leave off the extraction of ore from the mine. On the 12th they cleaned up the mill, secured the bullion, and on the 14th the fund of fifty-four hundred and odd dollars derived therefrom was distributed through the committee's direction among the miners pro rata, in proportion to their several claims against the company up to the time of their taking possession, the fund paying ninety-four per cent. of their respective demands. By direction of the committee, the checks were drawn by Boreman in their behalf. Grayson assumed possession on or about the 14th. In the meantime the pumps had been kept running through his direction, he becoming responsible for the expenses thereof. On the 17th, Grayson wrote to the secretary of the Portland company: "You have forfeited your rights under the bond I gave to the Virtue Mining, Milling & Development Company, under which you were operating said mine, and abandoned it to your creditors. I have taken hold of the property as my right under the bond." On June 30, the attorney, signing both for the company and its assignee, wrote Grayson at Baker City: "Mr. Heitkemper finds your letter on his return from Chicago, and gave it to me to answer. The property of the company, as you well know, was not abandoned to its creditors, or any one else. Your right or authority to take possession of it, its proceeds or earn-

ings, is denied. The assignee demands the mine and its proceeds and earnings from you; also the twenty-stamp mill which you still fail to deliver." Grayson claims to have never received this letter. On July 13 he again wrote from San Francisco to the president of the company, saying, among other things: "When I was in Portland, in June, your secretary stated that you had so far had a hard time, and spent a large sum of money, and in view of that I should be as lenient as I could in enforcing the bond under which you were working. Your only hope then seemed to be that you might sell to some one, and get your money back. I have not at any time desired to prevent you from selling, so that you might reimburse yourself, and will not now stand in your way between this and September."

After Grayson took charge the mine was cleaned up, and what water remained was pumped out, and to some extent it was operated by the extraction of ore and milling the same, under Boreman's supervision, he acting for Grayson until near the 1st of August. In the latter part of July a rich pocket was discovered, and Grayson again visited the mine. While there on this occasion, Mr. Heitkemper and Judge Stuart went from Portland to see him, and Mr. Heitkemper testifies that Judge Stuart, in behalf of the assignee, made a positive demand of Grayson for a surrender of the possession of the mine. Grayson denies the demand *sub modo*, although he admits it was talked about. Stuart remained but a short time, but Heitkemper stayed for several days. During the time that one or both these parties were on the ground, Mr. J. McNally, a miner of large experience, and with whom Grayson had been in correspondence, came to Baker City, and, while Heitkemper was still there, assumed the supervision of the mine in the place of Boreman. Grayson testifies that it was by virtue of an understanding between

him and Heitkemper that he was put in charge, but Heitkemper denies this, and McNally says that Grayson and Heitkemper employed him to take charge. McNally had not been at the mine at the time, and when he went for the first time, Heitkemper and Grayson went with him. Heitkemper says, in this connection: "I was still negotiating with some parties in Chicago who wanted to buy the mine, and he (McNally) wrote me a very nice letter that I could show so I might still sell the mine. Q. You thought you might make the sale? A. Yes, sir; because Mr. Grayson said if I could sell the mine he would have no objections, but he would not let us run it, or would not let us have possession of it." Heitkemper waited over several days, expecting a party from Chicago, whom it was intended should inspect the mine with a view to purchasing. As touching Grayson's willingness to allow the purchase under the contract, Clarno, in giving an account of his conference with him on June 6, says: "He (Grayson) stated that if they were able to pay him \$45,000, he would surrender the mine; that he did not want the property; that he had other mines; that he was getting old, and it was a long way from home; and that if they would pay him \$45,000 he was willing to give up the mine." Grayson testifies that when McNally took charge it was agreed with Heitkemper that he should run the mine in the interest of the Virtue Mining Company, keep it open, and give all benefit that might arise therefrom to the company; that he (Grayson) was to reserve only the expenses of mining it, and the company to have the benefit of the net proceeds under the bond. This is denied by Heitkemper in a general way. Grayson made no attempt at concealment of the specimens of rich ore they had discovered; on the contrary he freely exhibited them to Heitkemper and Stuart, and some of them were exhibited in Portland to aid in disposing of the mine, and one, in value

about \$900, was left with Heitkemper, which was later on returned to Grayson. This concludes a narrative of the most important events touching the present dispute, and from it we are to determine the relative rights of the parties.

It is contended: First, that Grayson and Boreman entered into a conspiracy to hinder and delay the Virtue Mining Company in raising the water from the mine, and to so burden and encumber the operation of it as to compel the company to abandon its privileges under the contract, after it had at large expense practically freed the mine of water, that Grayson might thereby reap the benefit of such outlay, and that the fact of the miners having taken forcible possession was but the means of a preconceived scheme by which Grayson should obtain possession through them; second, that, if the conspiracy is not established, nevertheless Boreman has been grossly culpable in his management of the mine, that he incited the men to riot, and that, having gained possession through this means, the acts of Boreman became Grayson's acts by adoption, and therefore his possession was wrongful; third, that in any event the company was not in default under the contract, and Grayson was not entitled to possession; and, fourth, that as a result of Grayson's entry, he has waived strict performance upon the part of the company in tendering payment of the purchase price before suit, because (1) he is himself at fault, (2) he has rescinded or repudiated the contract, and (3) an accounting was made necessary: Grayson contends: First, that the company had abandoned the mine when he took possession, and therefore his entry was rightful; second, that his possession was acquiesced in, and his management agreed to, by the company; and, third, that the company having failed to tender the purchase price, it has forfeited its privilege of purchasing under the contract.

First. That the mine was not successfully operated under the supervision of Mr. Boreman is a fact beyond dispute, but the company was all the while cognizant of his methods of management. George Walker, its representative and managing agent, was on the ground, and Boreman was subject to his superior authority, and it seems Boreman's supervision was concurred in in the main; we recall but a single instance of protest. Boreman was perhaps unduly solicitous to serve the interest of Grayson, but from what motives it does not appear, possibly personal to himself. This is made apparent from a letter written by Boreman April 29, addressed to Grayson, but never sent, wherein he gives several reasons why he thought the company could not succeed, and suggested that if Grayson would come to Baker City about May 10 or 12, he could see for himself where it would be to his interest to take hold of the mine. He says: "I earnestly ask you to come up as soon as possible; it is essential you should come, and to your best interests." His acts about the time of the assignment and change of possession also indicate as much. But it is not clear that Grayson acceded to his wishes, or in any manner connived with him in the embarrassment of the company, or the displacement of its possession. He did appear at Baker City about the 9th of May, openly, however, and without any attempt to conceal his presence. The company knew it, and Mr. Heitkemper, the secretary, was on the ground at the time, and the condition of affairs was discussed between them. Nothing was done or attempted on the part of Grayson indicating his intention to take charge of the mine until the assignment was made known to him, and we conclude that no conspiracy existed between him and Boreman to oust the company of possession.

As to the second contention, Boreman, as superintendent of the mine, being directly under the supervision

of the company and its representatives up to the time of the assignment, his acts must be deemed the acts of the company, and we do not think it proven that he incited the miners to riot. They probably took charge of the mine of their own volition, in order to make sure of their wages then unpaid, knowing that the company had assigned, which indicated its insolvency, so that there were no acts imputable to Boreman touching the change of possession for which any responsibility could attach to Grayson. The dispatch from Oakland would indicate that Grayson had employed a Baker City attorney to look after his interests. This he had a right to do, and to keep himself informed of any contemplated surrender of the company's rights, to know of the exact condition of affairs at the mine at all times, and especially of such an important matter as the assignment by the company of all its assets, which carried to the assignee the contract under which it was operating.

5. Under the third head, the company was evidently not in default, unless the assignment, the attendant circumstances, and the acts of the assignee operated as an abandonment. It is claimed that the company forfeited its right to possession by reason of not having operated and developed the mine in a proper and workmanlike manner, but this contention is not supported by the evidence. While, perhaps, it was not operated as Grayson thought it should be, yet other persons of experience would not be willing to condemn the work as being unskillfully done. We are not inclined to hold that the act of assignment was itself an abandonment, as it seems to have been resorted to as an expedient for the purpose of dissolving the attachments, and thereby removing an obstruction to the operation of the mine. The stockholders were prepared to meet the expenses under the management of the assignee, and it was the intention of all concerned to keep

it running. However, some acts of the company and the assignee subsequent to the assignment are strongly indicative of a purpose not to press their right to possession. The assignee, after appointing a meeting with Grayson on the morning following their conference on June 6, came away to Portland without keeping the appointment; and, although the miners remained in possession some six days later, neither he nor any person in behalf of the company returned to Baker City with a view to settling with the men or regaining possession of the mine, nor was there any correspondence had to that end. In fact, no representative of the company appeared at the mine to claim possession until Mr. Heitkemper and Judge Stuart made the alleged demand for it during the latter days of July. Shortly after Mr. Grayson assumed possession, he notified the company of what he had done, and his position in the premises. Thirteen days later, both the assignee and the company by letter disclaimed any abandonment upon their part, and demanded the mine and its proceeds and earnings. These circumstances, to say the least, do not indicate a great deal of solicitude on the part of the company as it respects possession for the time being, but they were perhaps sufficient to forestall an abandonment upon its part, or the part of the assignee. Under the contract, the company need not have operated the mine for a period of sixty days, but by its arrangements with Grayson he was to be notified if it determined at any time to discontinue its operation, so that he could keep the water from rising again, and Grayson claims that, although not notified, the conditions were such that he was justified in believing the company did intend to cease operations, and in entering for the purpose of preserving the property from damage. We are not prepared to say that Grayson was not in fault in entering when he did. The conditions under which he was entitled to enter had not trans-

pired, and we believe his possession was wrongfully obtained. It was urged, however, that Heitkemper, the secretary of the company, agreed with Grayson, in the latter part of July, that he (Grayson) should retain possession of and operate the mine, and account to the company for the net proceeds, after deducting expenses for operation, and that McNally should be employed as superintendent during the life of the contract. But it is useless to discuss this proposition, as Heitkemper was without authority to enter into such an agreement, and Grayson continued in possession in violation of his contractual relations with the company.

6. Again, it is strenuously urged that Grayson, by the act of entry and attendant circumstances, rescinded and utterly repudiated the contract, which operated as a denial of the company's right to purchase, and hence that it was absolutely excused from even a tender of performance before entering suit. On the 17th of July, Grayson wrote: "You have forfeited your rights under the bond * * * under which you were operating the mine, and abandoned it to your creditors. I have taken hold of the property as my right under the bond." The letter would seem to be broad enough to include a denial of all the company's rights under the contract, but it must be construed in the light of the attendant circumstances. Some time later Grayson wrote: "I have not at any time desired to prevent you from selling * * * and will not now stand in your way between this and September." The company, prior to the entry by Grayson, had been endeavoring to sell, and had, on May 29, offered to sell to Grayson its interest in the contract, on condition that he pay to it simply the amount of money which had been expended. Although this letter was intended to explain the former, it cannot change its effect. But, prior to writing the letter of the 17th, Grayson told Clarno that the company

excused from performing, or at least from performing strictly. It is very true that the company was entitled to possession for the purpose indicated, but, notwithstanding the fact that Grayson obtained and kept possession, plaintiff has chosen to enforce performance; this it could not do without paying the purchase price, and if it must first pay, what is there in the transaction that will waive payment in the manner and at the time designated? Nothing that we can see. So that the fact of Grayson's wrongful possession does not alone excuse strict performance on the part of plaintiff, if he would enforce specific performance. It might have excused punctuality, but not performance.

7. Now, as to the accounting: It appears that Grayson extracted bullion to the value of \$19,869.81 between the time of his taking possession and September 1, 1893. His expenses for the same length of time were \$16,273.17. During this period no improvements were made, except what was necessary for the operation of the mine. This leaves a net product of \$3,596.64. This amount the company was to have the benefit of, providing it exercised its privilege to purchase; otherwise it could have no interest in it. That is to say, if it concluded to take the mine and pay the difference between this sum and the \$45,000, the right was accorded under the contract; but if it did not want the mine, then it could not claim any interest in this particular fund. At most, it could claim no greater benefit than the value of the gross product. There is no pretense that either the assignee or the company tendered to Grayson any part of the purchase price, or that an accounting was ever requested or demanded preliminary to an ascertainment of the amount required to be tendered to meet the balance due. An accounting out of court would have obviated the necessity of an accounting in court, and whatever might

have been the result of such a demand, it is certain there has been no refusal on Grayson's part to account. It was held in *Deichmann v. Deichmann*, 49 Mo. 110, that uncertainty as to the amount actually due will obviate the necessity of a tender. But, unless Grayson refused to account with the plaintiff, it is difficult to see how the simple fact that there was an unadjusted account between the parties can operate as a waiver of the tender. But, aside from this, if there was a balance remaining after deducting the proceeds, whether net or gross, from the \$45,000, it was incumbent upon the plaintiff to tender such balance. Payment being the manner of declaring his privilege, no interest passed to him in the mine unless he so declared it; hence a suit for specific performance cannot lie. BIRD, V. C., in *Miller v. Cameron*,* 45 N. J. Eq. 95 (1 L. R. A. 554, 15 Atl. 842), says: "There may be, doubtless are, many cases in which the complainant would be excused from showing an offer to perform; but I cannot but think, in a case where the complainant is not originally bound, that is, is not bound at all by the contract, and cannot himself be brought into court, he should by all means be required to show that he had most faithfully performed every stipulation on his part to be performed, so far as they appear on the record. If he intends to hold the other party to the contract which he has signed, he himself should not be guilty of a moment's trifling, without a most satisfactory excuse." See also Pomeroy's *Specific Performance of Contracts*, §§ 315, 324.

8. As touching the amount which he should have tendered, he was called upon to determine that at his peril, or he may have tendered on condition that Grayson account.

*NOTE.—With this case in 1 L. R. A. 554 is a collection of authorities discussing Enforcement of Unilateral Contracts; Performance by Complainant as a Condition Precedent to Specific Performance; and When Tender is Not Necessary.—REPORTER.

Of course, if Grayson had taken out a net product of \$45,000 prior to September 1, 1893, no tender would have been necessary, and this is the theory that plaintiff seems to have proceeded upon. Or, perhaps, if he had taken out approximately that amount, so that it might reasonably be presumed that plaintiff purposed purchasing under his option, the result might have been the same. Equity has regard for substance rather than technical exaction. But he has not proven such a case. He does not even tender performance in the complaint or a willingness to pay any balance that may be found remaining of the \$45,000 on an accounting. In *Duvall v. Myers*, 2 Md. Ch. 405, JOHNSON, Chancellor, says: "A party not bound by the agreement itself has no right to call upon the judicial authority to enforce performance against the other contracting party, by expressing his willingness in his bill to perform his part of the agreement. His right to the aid of this court does not depend upon his subsequent offer to perform the contract upon his part, when events may have rendered it advantageous to do so, but upon its originally obligatory character." See also *Ducie v. Ford*, 8 Mont. 240 (19 Pac. 411), and *Askew v. Carr*, 81 Ga. 686 (8 S. E. 74). The allegation is that he is "ready, willing, and waiting to perform." This is not a tender of performance. The offer in the complaint, if otherwise sufficient, should have been to do the things necessary to complete or mature the right which it was the plaintiff's privilege to acquire, so that there could have been no uncertainty touching his intention to purchase, providing the fund in the hands of Grayson proved insufficient to pay the purchase price. As the complaint stands, plaintiff does not disclose a desire to purchase upon any other condition except that of finding funds upon an accounting sufficient to pay the purchase price. He has failed to establish the condition, and the suit cannot be maintained.

9. One element of the prayer of plaintiff is that he be put in possession and maintained there, and that a future time be fixed in which plaintiff shall satisfy any balance found due on the accounting after possession given, and this proposition was urged both in the briefs and at the argument. We think it untenable for two reasons: First, the act required of the court comprehends an order continuous in its nature, requiring protracted supervision and direction, with the exercise of special knowledge, skill, or judgment in the oversight, to determine whether the mine is being operated under the conditions of the contract, and will not be specifically enforced: *Pomeroy's Specific Performance of Contracts*, § 312; *Marble Co. v. Ripley*, 77 U. S. 358; *Beck v. Allison*, 56 N. Y. 367 (15 Am. Rep. 430); *Masten v. Halley*, 61 Mo. 196; and, second, the fixing a new time for payment would be the making of a new contract. The court cannot make contracts for parties. Its duty is to determine their rights under the contracts they have made for themselves, and when this is done it can do no more.

This leaves undisposed of the question touching the right of the company under the contract to assign to Clarno without Grayson's assent, and the incidental questions of the power and authority of the assignee to take the possession of the assigned property prior to filing his undertaking as such an officer, or to operate the mine and declare the option by performance of the conditions made necessary by stipulation of the original parties, and his right to maintain the suit, their settlement not being necessary to a determination of the cause. What we have incidentally said touching such rights and authority has been upon the assumption that he was duly clothed therewith, but we are not to be understood as having decided any of these questions.

There was some controversy touching a twenty-stamp

mill which it is alleged that Grayson agreed to furnish. This mill was constructed at the mine prior to the execution of the contract with Ralston, and subsequently, and prior to the time at which the Portland company became interested, was renovated and reconstructed into a ten-stamp concern, and this latter went into possession of the company, so there was no obligation on the part of Grayson to furnish a twenty-stamp mill as demanded. The renovated mill became the property of Grayson when the company failed to purchase the mine under the stipulated privilege. Let a decree be here entered affirming the decree of the court below.

AFFIRMED.

Argued October 26: decided December 21, 1896.

STATE v. ELLSWORTH.

(47 Pac. 199.)

1. **CROSS EXAMINATION—HOSTILITY OF WITNESS.**—A jury is entitled to know the bias of a witness and the extent to which his feelings are enlisted in a cause, so that they may fairly determine the weight to be given to his testimony, and for the purpose of ascertaining his opinion it is proper to ask on cross examination if he had not expressed a certain feeling or used a given expression concerning the case.
2. **FOUNDATION FOR SHOWING HOSTILITY OF WITNESS.**—The rule for laying the foundation is the same where it is intended to show the hostility of a witness as where it is intended to impeach him: *State v. Stewart*, 11 Or. 52, cited and followed. Thus, as a foundation for showing hostility of a witness to defendant, E., it is enough to ask if, in referring to failure of the jury to agree on a verdict at a former trial, the witness did not, at a certain time and place, ask his friend, a man about 60 or 65 years old, with a gray moustache, whose name was unknown to counsel, what he thought of the jury in the E. case, and, on his answering that he understood that they disagreed, say to him, "Well, that was better than an acquittal." This was sufficiently definite as to time, place, and persons present to refresh the witness' memory.
3. **HOMICIDE BY POISONING—INSTRUCTIONS AS TO DEGREE OF GUILT.**—Sections 1714 and 1727 of Hill's Code, considered together, do not provide that every death caused by poisoning shall be murder in the first degree, but only that the State must prove by some appropriate evidence, as, for example, by showing the giving of poison, or a waylaying, that deliberation and premeditation existed in the mind of the defendant when the deadly act was committed.

30	145
33	38
33	40

30	145
35	535

30	145
37	88

30	145
130	79

30	145
43	453

4. HOMICIDE BY POISONING—INSTRUCTION AS TO DEGREE OF GUILT.—

One charged with murder in the first degree by poisoning is not entitled as a matter of law to have the jury instructed to convict as charged or acquit. If there is any evidence tending to raise a doubt as to the intent with which the act was done, the conviction should be for a lower degree only, and evidence of good reputation is sufficient for that purpose. Thus, where deceased died in a convulsion soon after defendant administered what he claimed was a powder of corn starch, and strychnine was found in her stomach, and experts said she died of strychnine poison, though there was no evidence that strychnine was kept by defendant or deceased, from which it might be inferred that he administered it by mistake, yet, he having offered proof of his general reputation for peace and good order, tending to raise a doubt as to the intent with which the act was done, if done by him, it was proper to instruct on manslaughter.*

From Multnomah: THOS. A. STEPHENS, Judge.

Appellant W. E. Ellsworth was on the 20th day of February, 1895, indicted by the grand jury of Multnomah County for the crime of murder, by administering to his wife, Edith Ellsworth, strychnine. To this indictment he pleaded not guilty; a trial was had which resulted in a disagreement of the jury, and afterwards a second trial was had, when the jury returned a verdict of guilty of manslaughter.

The record shows that the defense was based wholly on scientific propositions, and the evidence was therefore

*The instruction here given was as follows: "If you shall believe from the evidence in this case, beyond a reasonable doubt, that the prisoner at bar on the 9th day of February, 1895, in this County and State, was engaged in the commission of a lawful act, that is to say, that he was engaged in administering unto said deceased, Edith Ellsworth, what he honestly believed to be a harmless powder, and without due caution or circumspection he administered to her, the said Edith Ellsworth, a dose of strychnine poison instead; and you shall further find that from the effect of said strychnine poison so administered by defendant to the said Edith Ellsworth she died in this County and State within a year; or if you shall believe from the evidence in this case, beyond a reasonable doubt, that the defendant at bar through culpable negligence on his part administered to said Edith Ellsworth strychnine poison from the effect of which strychnine poison she died in this County and State within one year, that I charge you in either case as I have instructed you the law to be, will constitute the crime of manslaughter, and you shall so find by your verdict."—REPORTER.

largely of a scientific nature. The deceased was a woman of highly nervous, hysterical temperament, who was addicted to the use of morphine, was afflicted with frequent nervous headaches which resisted treatment, and had become habituated to the use of and dependent upon medicine. A short time before her death she had had a miscarriage, and at the autopsy her womb was found to be enlarged and spongy, and to contain a portion of the placenta, pus, and mucopus. The record discloses testimony tending to prove a conversation between deceased and appellant to the effect that appellant was to obtain from the doctor some medicine to increase the flow, and that in the evening when she had asked him for the medicine, rather than tell her that he had not considered it necessary that she should have the medicine, and thereby incite a nervous condition, he went into the pantry, prepared a powder of corn starch, and gave it to her, at seven o'clock, while she was in bed, telling her that it was the medicine which the doctor had sent her. It also appears he had resorted to this or similar subterfuges before, to her relief. Soon after taking the powder, she commenced to have a "jerky" feeling, which soon ripened into convulsions, and before the doctor arrived, at two o'clock in the morning, she had had several; after the doctor arrived and before her death she had three convulsions, all tetanic in character, all about equal distance apart, and of about equal severity and duration. She died in a convulsion at a quarter before five, nine hours and forty-five minutes after the taking of the powder.

The main defense was that had this powder given to her by appellant been strychnine, and there is no evidence in the record of any other substance having been given to her by him, she should have died at thirty minutes after eight, and she could not have lived longer than half-past twelve, dying in convulsion, and that the convulsions

would increase in frequency, severity, and duration; and scientific authorities were cited to show, and physicians were called to prove, that no case has ever been recorded or heard of where a person who had taken a lethal dose of strychnine lived longer than five and one-half hours, the patient dying in convulsion. Indeed, it was shown that there is only one case recorded where the patient survived so long, most of them dying within one and one-half hours; hence the impossibility of this crime having been committed as charged in the indictment, and suggesting the possibility that she may have died from toxic causes other than strychnine, e. g., septicaemia or ptomaines.

The chemist who performed the analysis of the stomach, a witness for the state, produced in court a bottle containing a solution, which he testified was the residue obtained from his analysis, that he had performed on a portion of the solution the test for strychnine, which consisted in evaporating in a white porcelain dish a few drops to dryness, and then adding a few drops of sulphuric acid, and then adding a small particle of bichromate of potash; on adding the bichromate of potash a rotation of colors should be produced, first blue, changing quickly into violet or purple, then to pink, then to red, and then to yellow, and, after about an hour, into dirty green. These colors, when obtained in this rotation from a solution so treated, prove, witness says, that the solution contains strychnine. The state offered by this witness to perform the test for strychnine on a portion of this solution in the presence of the jury. There being no objection interposed on behalf of appellant, witness proceeded with the test down to obtaining the color "yellow," witness telling the jury that the color "dirty green" would manifest itself in about an hour. The dish was then offered in evidence by appellant, and received and thereupon removed from the view of the

jury. In about an hour counsel for appellant moved the court that the dish be produced and shown to the jury in order that the jury might note the presence or absence of the color "dirty green." The court denied the motion. On a subsequent day, when appellant was offering evidence on the defense, the court offered appellant the privilege of reproducing the color test, which the appellant declined. This appellant claims was error, for the reason that the color "dirty green" is not a color in the rotation produced in this test, but that "yellow" is the terminal color given by all authorities, and testified to by all other scientific witnesses who testified in the case, the substance then fading to no color; and, therefore, if the dish had been exhibited to the jury when called for, it would have shown the absence of the color "dirty green," and hence would have had a tendency to establish either the unreliability of witness' testimony, or the absence of strychnine, if his testimony was believed.

The record discloses another defense which was relied upon somewhat, namely, want of care in the custody of the stomach, and in making the analysis. The stomach when removed was placed in a Mason fruit jar, which was not known to be clean, the top was screwed down but not sealed, and the contents of the jar was not known to have not been tampered with between that time and the time when it was handed to the chemist for analysis. The chemist who made the analysis did not examine the chemicals used for impurities, using always chemicals labelled "chemically pure," hence appellant claimed that the result obtained could be but doubtful, was based on information and belief, was hearsay, and therefore not evidence. The other errors relied upon were in sustaining objections to questions propounded by appellant to witnesses for the state for the purpose of showing bias and amount of bias existing in their minds, and in ordering witnesses not to answer

those questions, no objection having been interposed; and in charging the jury that they might return a verdict of manslaughter in this case, there being no evidence of an accidental giving. A motion for a new trial having been overruled, judgment of the court was passed upon appellant, he being sentenced to imprisonment in the penitentiary for the period of fifteen years, and to pay a fine of \$1,000, from which he appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Messrs. John R. Stoddard*, and *John C. Leasure*.

For the State there was a brief by *Mr. Wilson T. Hume*, with an oral argument by *Messrs. Cicero M. Idleman*, Attorney-General, and *Charles F. Lord*, District Attorney.

Opinion by MR. CHIEF JUSTICE MOORE.

I. The record discloses that at the trial, one Frank C. Middleton, a newspaper reporter, being called as a witness by and having given material evidence for the state, testified on cross-examination that he had talked considerably about the case; that he had a very decided opinion about it, and had expressed such opinion to others; and, referring to counsel for defendant, said: "I have expressed it to you, Mr. Leasure, and also to Mr. Sears." Mr. Leasure, for the purpose of showing the bias of the witness, asked him the following questions: "Do you remember at any time making an expression to me that he was as guilty as hell?" "Did you ever state to Mr. Alfred Sears, counsel in this case, that you thought the defendant ought to be hung?" The court, referring to the first question, and without objection from counsel for the state, said to the witness: "You need not answer it," and sustained an objection to the other question. The

defendant excepted to this remark and ruling, and now contends that he was thereby denied the right of showing to the jury the prejudice of the witness. It will be observed from an examination of the testimony of the witness, that as to the merits of the case he had a decided opinion, which he expressed to others, but the jury were not informed as to whether such opinion was in favor of or opposed to the accused, and hence were left in doubt as to the degree of credibility to be accorded to his evidence. It might seem that the question as propounded to the witness did not sufficiently call his attention to the time, place, and circumstances when it is assumed he expressed the opinion to Mr. Leasure. The object of this requirement in connection with such questions is to enable the witness to revive in his memory the particular circumstance of which inquiry is made; but, this witness having stated that he had expressed an opinion to Mr. Leasure and Mr. Sears, the necessity of calling his attention to these preliminary facts was obviated, and the question to be considered is whether the refusal of the court to permit the witness to answer the question was the denial of a substantial right to the prejudice of the defendant. Prof. Greenleaf, in his work on Evidence (Vol. 1, § 450), in speaking of the right of a defendant in a criminal action to inquire as to the bias of a witness called by his adversary, says: "It has been held not irrelevant to the guilt or innocence of one charged with a crime to inquire of the witness for the prosecution, in cross examination, whether he has not expressed feelings of hostility towards the prisoner."

In *Starks v. People*, 5 Denio, 106, the plaintiff in error being on trial for arson, one E. Perkins appeared as a witness for the prosecution, and on cross-examination was asked whether, at a certain time, in speaking to one James Dunton, of the prisoner, and referring to a certain black

ash swamp, he had not said: "There would be a good place to kill Starks." The witness having answered in the negative, Dunton was called on the part of the accused to prove that Perkins had made use of the language attributed to him; but, an objection to the question having been sustained, and an exception allowed, the prisoner appealed upon being convicted and sentenced, and BEARDSLEY, C. J., in reversing the judgment, says: "How much, if anything, the evidence of the witness Dunton would have amounted to is not for us to say, but it was clearly competent, and should not have been rejected by the court. It tended more or less to show ill will or malice on the part of the witness towards the prisoner on trial, and was therefore pertinent and material. It is always competent to show that a witness is hostile to the party against whom he is called; that he has threatened revenge; or that a quarrel exists between them. A jury would scrutinize more closely and doubtingly the evidence of a hostile than of an indifferent or friendly witness. Hence it is always competent to show the relations which exist between the witness and the party against, as well as the one for, whom he was called. The inquiry is material, and goes directly to the credit of the witness in the particular case." In *People v. Wasson*, 65 Cal. 538 (4 Pac. 555), the defendant being on trial for murder, one Thomas Carroll was called as a witness for the prosecution, and on cross examination was asked the following question: "I will ask you now, Mr. Carroll, if on Saturday evening, in Pike Payne's saloon, in the town of Red Bluff, in the presence of Mr. McGowan and Mr. Thatch, both witnesses in this case, you did not make the remark that Wasson (the defendant) ought to have been hung before he felt Butte Creek?" An objection to this question having been sustained and an exception allowed, the defendant was found guilty, and the court, in reversing the judgment, and

quoting from the opinion in *People v. Benson*, 52 Cal. 380, say: "It is difficult to see on what ground this evidence was excluded, as it is perfectly well settled that on cross examination a witness may be interrogated as to any circumstance which tends to impeach his credibility by showing that he is biased against the party conducting the cross examination, or that he has an interest in the result adverse to such party. No citation of authorities is needed on a point so well settled, and the ruling was obviously erroneous." In the case at bar the jury were entitled to know what opinion the witness had expressed, that they might be able to judge of the weight and credibility to be given to his testimony, and the refusal of the court to permit the question to be answered was clearly erroneous, and the denial of a substantial right.

2. Dr. H. W. Cardwell, the physician who was at the death bed, was also called as a witness by the state, and gave material evidence against the defendant, and on cross examination by Mr. Stoddard was asked if, in referring to the failure of the jury to agree upon a verdict at a former trial of this action, he did not, at a certain time and place, ask his friend, a man with a gray moustache, and whose age was about sixty or sixty-five years, but whose name was unknown to counsel for the defendant, "What do you think of the jury in the Ellsworth case?" and upon his answering, "Oh, I understand they have disagreed," did you not then say, "Well, that is better than an acquittal"? An objection to this question having been sustained, the defendant excepted, and now insists that the language attributed to the witness shows hostility to the defendant, and that the person to whom the question was propounded and the remark made was sufficiently identified to revive in the memory of the witness the conversation to which his attention was directed. The rule is well settled in this State that before the hostility of a

witness can be shown by proof of unfriendly remarks or implicative acts, such proof must be laid by calling his attention to the time, place, and persons present when the words or acts attributed to him were uttered or done, that he may refresh his memory, and be afforded an opportunity for explanation: *State v. Stewart*, 11 Or. 52 (4 Pac. 128). The name of the person to whom the remark was made is not given, but that, if unknown to counsel, could be of little consequence, if the circumstances were detailed with that degree of particularity that necessarily called attention to the language or act complained of, and revived them in the memory of the witness: *Pendleton v. Empire Stone Dressing Co.*, 19 N. Y. 13. Viewed by the rule laid down in that case, we think the question must have accomplished this purpose, and, if the answer should be in the affirmative, it would tend to show bias, the remark being more than the mere expression of an opinion as to the guilt of the accused, in which case it was the duty of the court to permit the question to be answered: *People v. Lee Ah Chuck*, 66 Cal. 662 (6 Pac. 859).

3. Counsel for the defendant insist that under the evidence submitted the jury were compelled, either to find him guilty as charged in the indictment, or not guilty, and that the verdict rendered is equivalent to an acquittal; and, this being so, the judgment should be reversed, and the cause remanded with instructions to discharge the prisoner. In invoking this principle of law, counsel assumes that the jury must have found that the deceased died from the effects of poison administered by the defendant, and hence the use of the means adopted manifests such a degree of deliberation and premeditation as to show conclusively the existence of malice, from which the jury must have found him guilty of murder in the first degree; and that, if they could not so find, it was their duty to acquit him. Such an instruction having

been requested, it is claimed the court erred in charging that he might be convicted of manslaughter. Except in the commission of or attempt to commit rape, arson, robbery, or burglary, the killing of another, to constitute murder in the first degree, must have been done purposely and of deliberate and premeditated malice: Hill's Code, § 1714. And it is further provided that "There shall be some other evidence of malice than the mere proof of the killing to constitute murder in the first degree, unless the killing was effected in the commission or attempt to commit a felony; and deliberation and premeditation, when necessary to constitute murder in the first degree, shall be evidenced by poisoning, lying in wait, or some other proof that the design was formed and matured in cool blood, and not hastily upon the occasion": Code, § 1727. It is not the mere intent to kill, but rather the manner and circumstance of the killing, coupled with the intent, that renders the act malicious. "The fact that a killing was intentional," says BIGELOW, C. J., in *State v. Vaughan* (Nev). 39 Pac. 733, "does not necessarily prove that it was done with malice; for an intentional killing may be entirely justifiable, as where it is done in necessary self-defense, or it may be only manslaughter, as where it is done in the heat of passion caused by a sufficient provocation. What it is must depend upon the manner of the killing and the surrounding circumstances." The intention to take the life of another by poison presupposes that the substance adopted to carry the evil design into execution can be administered to the victim without the latter's knowledge, and the mere intent to take life by this means, when death ensues, evinces such deliberation and premeditation as to establish conclusively the existence of malice.

But can it be said that proof of death by poison conclusively implies that the substance producing such result was administered with intent to take life? If this ques-

tion be answered in the affirmative, then it follows that the physician who prescribes a toxic remedy in ordinary doses for the relief of his patient, the druggist who compounds it, and the friend of the deceased who knowingly administers it, are each equally guilty of murder in the first degree, providing the patient, possessing some unknown constitutional idiosyncrasy, die from its effects, although the same medicine, when given to others less susceptible to its influences, would prove a mild tonic or gentle stimulant. The mere statement of the consequences dependent upon the adoption of such a legal proposition ought to prove its own refutation, for, if such a rule could be invoked, heroic treatment in dangerous cases could never be adopted by the most skillful physician. In cases of death by other means, courts have said, in effect, that homicide by poison carries with it conclusive evidence from which a jury would have no option but to find the person administering the substance guilty of murder in the first degree: *People v. Bealoba*, 17 Cal. 389; *State v. Millain*, 3 Nev. 409; *State v. Garrand*, 5 Or. 216; *Aguilar v. Territory* (N. M.), 46 Pac. 342; *Territory v. Padilla*, 46 Pac. 346. The language here used was adopted by way of illustration only, and to show that death by other means than poison did not necessarily imply deliberation and premeditation, and hence was not evidence of malice, but the dictum not having been used in cases of death by poisoning can have but little weight in the case at bar. In *Commonwealth v. Dougherty*, 2 Browne (Pa.) Append. 18, it is said that in murder by poison the intention is of the essence of the crime. So, too, in *Commonwealth v. Keeper of the Prison*, 2 Ashmead, 227, it was held that to constitute murder in the first degree by poison the killing must have been willful. In Pennsylvania, under a statute which provides that the jury in the trial of a person indicted for homicide shall, in case of conviction, find whether it is murder in

the first or second degree, it has been held error in the trial of a person accused of murder by poison to charge the jury that if they found the defendant guilty, their verdict must be of murder in the first degree: *Lane v. Commonwealth*, 59 Pa. St. 371; *Shaffner v. Commonwealth*, 72 Pa. St. 60 (13 Am. Rep. 649); *McMeed v. Commonwealth*, 114 Pa. St. 300 (9 Atl. 878). Such also would seem to be the rule in Connecticut: See *State v. Dowd*, 19 Conn. 387. In these cases, however, it may well be doubted if the question at bar as involved, for, in *Commonwealth v. Dougherty*, 2 Browne (Pa.) Append. 18, the defendant was tried for a homicide committed with an ax, while *Commonwealth v. Keeper of the Prison*, 2 Ashmead, 227, was a proceeding by habeas corpus to admit to bail persons held for trial upon a charge of murder by administration of poison. The decisions in the other Pennsylvania cases proceed upon the theory that the instructions complained of took from the jury the consideration of a question which was solely within their province.

In *Ann v. State*, 11 Humph. 159, the plaintiff in error, a female slave, aged about fifteen years, being convicted of murder in the first degree in killing an infant about five weeks old, by administering laudanum to it, to produce sleep, appealed, and MCKINNEY, J., referring to 4 Blackstone's Commentaries, 199, and Foster's Crown Law, 261, in reversing the judgment, says: "If, as Blackstone says, the poison were willfully administered, that is, with intent that it should have the effect of destroying the life of the party; or if, in the language of Foster, the act were 'done deliberately and with intention of mischief, or great bodily harm,' and death ensue, it will be murder. But if it were not willful, and such deliberate mischievous intention do not appear, and the act was done heedlessly and incautiously, it will be only manslaughter at most." In *State v. Wagner*, 47 Am. Rep. 131, HOUGH, C. J., in commenting

upon the question, says: "Poison may be carefully and innocently administered for a lawful purpose, and yet may produce death, in which case no crime will have been committed. So, also, a homicide committed by poison heedlessly or incautiously administered for no unlawful purpose will amount, at most, only to manslaughter. But where poison is knowingly administered with intention of mischief, and to accomplish some unlawful purpose, if death ensue it will be murder, although death was not intended." In *Bechtelheimer v. State*, 54 Ind. 128, it is held that a purpose to kill is an ingredient of the crime of murder, when the killing is effected by the administration of poison. To the same effect also, see the case of *Robbins v. State*, 8 Ohio St. 131. The decision in that case is questioned in *State v. Brown*, 7 Or. 186, in which KELLY, C. J., says: "When a homicide takes place in the commission of a robbery, it is not necessary, in order to constitute murder in the first degree, that the one perpetrating it should purposely kill the person slain, and where purpose is not required to constitute the crime, it need not be alleged in the indictment," but the criticism does not go to the question of homicide by poison. In *State v. Wells*, 61 Iowa, 629 (47 Am. Rep. 822, 17 N. W. 90), which was a trial for murder committed by a prisoner in the penitentiary by administering chloroform to one of the guards of that institution, the Supreme Court of Iowa seems to have reached a different conclusion. SEEVERS, J., in rendering the decision, says: "We are unable to draw a distinction between a homicide which occurs during the perpetration of a robbery, and when the homicide is caused by the administration of poison. Both, under the statute, must be deemed murder." In *People v. Harris*, 136 N. Y. 423 (33 N. E. 65), GRAY, J., in speaking of the issues to be tried under an indictment charging murder by administering poison, says: "The two questions which, upon all the

circumstances detailed in the evidence, the jury had to pass upon in coming to their verdict were, in the first order, whether the deceased came to her death by morphine poisoning, and, having determined that in the affirmative, then whether the defendant was guilty of the charge of having administered it to her with a deliberate intent to cause her death thereby." And in this State it is provided by statute that in all cases of murder in the first degree, except in the commission or attempt to commit certain felonies therein enumerated, it is incumbent upon the state to allege in the indictment and prove at the trial that the killing was purposely done (Hill's Code, § 1714); and, this fact having been established, proof that it was accomplished by poison shows such deliberation and premeditation as evince murder in the first degree: Code, § 1727.

4. An indictment for the crime of murder in the first degree necessarily involves all other grades of homicide which the evidence tends to establish. The state, in preferring its charge, may carve out and allege in the indictment any degree of crime that the grand jury may consider the defendant guilty of, but at the trial he may be found guilty of any crime the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit such crime: Hill's Code, § 1383. The evidence introduced tended to show that the deceased died in a tetanic convulsion soon after the defendant administered to her what he claims was a powder composed of corn starch; that, an autopsy having been made, and Mrs. Ellsworth's stomach removed, an analysis of its contents revealed the presence of strychnine; and that several physicians, as experts, in answer to a hypothetical question predicated upon her symptoms and the discovery of poison in her stomach, say the deceased died of strychnine poison. Here was evidence to

warrant a finding that she died by this means, and, this fact having been established, the jury were compelled to ascertain whether the defendant administered the poison, and, if so, to find with what intent or under what circumstances it was given. In *State v. Garrand*, 5 Or. 216, it is held that if on a trial for murder there is no evidence of facts and circumstances such as would, under the law, reduce the crime charged to manslaughter, the judge may so inform the jury, and may charge them that they cannot consider the question of manslaughter. So too in *State v. Whitney*, 7 Or. 386, KELLY, C. J., says: "We do not undertake to say that when certain facts have been testified to, the court may not say to the jury that if they believe the testimony to be true, they should find the accused guilty of murder in the first degree." In 1794 the rule was announced in Pennsylvania that every unlawful killing was presumed to be murder, unless the person accused could show such circumstances as would reduce it to a lower degree of homicide (*Pennsylvania v. McFall*, Add. 255); but in a later case it was held that, although malice was presumed till the want thereof was shown, yet an unlawful killing, though it may be presumed murder, will not be presumed murder in the first degree: *Pennsylvania v. Lewis*, Add. 279. In 1845, WILDE, J., in a dissenting opinion in *Commonwealth v. York*, 9 Metc. (Mass.) 93, criticised this doctrine, and maintained that in criminal cases the burden of proof is on the prosecution throughout to make out the whole case. Since that time the reason assigned in this dissenting opinion is fast becoming the settled rule of law in this country, and seems to have been approved in *State v. Whitney*, 7 Or. 386, for it is there said: "The plea of not guilty was a continuous denial of every allegation in the indictment, and every statement of the witnesses who testified against him." In the case at bar, the defendant not having admitted the killing,

the presumption of his innocence controverted all evidence introduced by the state, and tended to disprove every grade of crime embraced in the indictment, and put in issue by the plea of not guilty; and, while no evidence was introduced tending to show that any strychnine was kept by the defendant or his wife, from which an inference might be drawn that in giving what he supposed to be corn starch he thereby carelessly administered a poison, yet he offered proof of his general reputation for peace and good order which tended to raise a doubt as to the intent with which the act was done, and aided the jury in ascertaining the probable degree of his guilt (*Carroll v. State*, 3 Humph. 315), from which, if it appeared to them that he had committed a crime, and there was reasonable doubt as to which of two degrees he was guilty, he could be convicted of the lower degree only (Hill's Code, § 1359); and, as the mere proof of death by the administration of poison does not necessarily imply an intentional killing, and there being evidence introduced at the trial tending to reduce the grade of homicide, it follows that there was no error in giving the instruction of which the defendant complains. By reason of the court's refusal to permit the witnesses Middleton and Cardwell to answer the question propounded to them, the judgment will be reversed, and the cause remanded for a new trial, and it is so ordered.

REVERSED.

Argued February 25; decided June 15, 1896.

COOPER v. THOMASON.

(45 Pac. 295.)

- I. TRUSTS—STATUTE OF FRAUDS—CODE, § 781.—Though a trust in real estate cannot be created by parol, the same rule does not apply to personal property; and if a grantee sells land under a parol agreement to convert it into money and pay the grantor's debts, his subsequent acknowledgment of the trust will bind him.

30	161
30	375
30	161
131	549
30	161
37	617
30	161
30	214
30	161
41	818
30	161
43	123
43	866
30	161
46	572

2. **PAROL EVIDENCE—EXPRESS TRUST.**—In a suit to enforce a trust in personal property which is the proceeds of land held in trust, parol evidence is admissible to prove the original agreement under which the premises were held, as a consideration for a subsequent declaration of the trust by the trustee.
3. **VENDOR AND PURCHASER—POSSESSION AS NOTICE.**—Possession of land by a third person is constructive notice of such person's legal and equitable rights: *Petrain v. Kiernan*, 23 Or. 455, and *Exon v. Dancke*, 24 Or. 110, applied and followed.
4. **VERBAL CONTRACT CONCERNING LAND—STATUTE OF FRAUDS—MEMORANDUM*—PART PERFORMANCE.**—A deed deposited in escrow is insufficient to take an oral contract for the sale of land out of the statute of frauds, unless such deed contains a memorandum of the agreement; nor is payment of the purchase price such a part performance as to overcome the plea of the statute; but taking possession in pursuance of the terms of the contract, and making improvements, is sufficient for that purpose.
5. **SPECIFIC PERFORMANCE.**—The vendor in a parol contract for the sale of lands may enforce specific performance thereof, where he has delivered possession to the purchaser, who has held such possession and made improvements entitling him to the enforcement of the contract as against the vendor.
6. **DEFECT OF PARTIES—DEMURRER—CODE, § 71.**—Where an objection for defect of parties is apparent on the face of the pleadings, the objection must be made by demurrer (section 71, Hill's Code), or it will be deemed waived.
7. **PRESUMPTION—CROSS APPEAL.**—A party who does not appeal from a judgment or decree is presumably satisfied, and his interests will not be considered on appeal.

From Polk: GEO. H. BURNETT, Judge.

This is a suit by J. S. Cooper and others against W. J. Thomason and others, to compel the specific performance of a contract for the purchase of land, and to have a deed therefor declared void and cancelled. The material facts

* For an interesting note on the essentials of a memorandum of agreement to sustain specific performance see *Mentz v. Newwitter*, 11 L. R. A. 97 (19 Am. St. Rep. 514). Many authorities showing that an undelivered deed is not a sufficient memorandum to satisfy the statute of frauds are appended to the case *Kopp v. Reiter*, 37 Am. St. Rep. 163 (22 L. R. A. 273). When possession is such an act of part performance as to take the case from under the statute of frauds, and authorize compulsory specific performance, is fully considered in notes to the following cases: *Emmel v. Hayes*, 22 Am. St. Rep. 777 (11 L. R. A. 323); *Culler v. Babcock*, 29 Am. St. Rep. 890-91; *Peek v. Peek*, 11 Am. St. Rep. 250; *Grant v. Grant*, 38 Am. St. Rep. 393 (1 L. R. A. 185).—REPORTER.

are that on March 3, 1893, the defendant H. Christian, being the owner in fee of a tract of land in Polk County, executed, with his wife, Emily Christian, and delivered to the plaintiff J. S. Cooper, as trustee, a warranty deed therefor. On the 25th of the next month, in consideration of the payment of \$1,000, and the execution of a note for \$6,100, payable in ninety days, Cooper, as trustee, by the advice and with the consent of Christian, executed a warranty deed of said premises to the defendant W. J. Thomason, who immediately entered into and retained the possession thereof. The deed and note were deposited with one W. H. Hawley, the cashier of the plaintiff the First National Bank of Independence, to be delivered to Thomason upon the payment of said note. At the date of the execution of the deed by Christian, he was indebted to said bank on his own account, and as a member of the firm of Klemsen & Christian, and on April 26, 1893, he had a partial settlement with the bank, and, upon being credited with the \$1,000 so paid by Thomason, gave his note for \$2,250, and took up some of his matured notes, but left in the bank several other notes on which he was liable as maker or indorser, amounting to \$1,981.22. On the next day the said firm settled their account with the bank by giving it their note for \$2,368.11. On May 2, 1893, Christian and wife executed to the defendant H. Hirschberg a quitclaim deed to said premises, which was recorded prior to the deed to Cooper. Thomason having made default in the payment of his note, this suit was instituted, and, the issues being joined, a trial was had by the court, which, having found for the plaintiff, rendered a decree granting the relief prayed for, from which the defendants Christian and wife and Hirschberg appeal.

AFFIRMED.

For appellants there was an oral argument by *Messrs.*

Martin L. Pipes and J. J. Daly, with a brief by Messrs. Reuben S. Strahan and Martin L. Pipes, urging these points:

The parol evidence admitted to prove the terms and conditions of the trust of which specific performance is asked is incompetent and in violation of the statute of frauds. The contention of respondents is that the statute of frauds is answered in this case by the mere fact that the trust deed from H. Christian and wife to J. S. Cooper designates the grantee as trustee. That the word trustee is deemed potent to satisfy the statute of frauds, and is in effect the conveyance or instrument in writing referred to in the statute. We contend that not only must it appear that a trust has been created or declared, but the writing itself must show the trust so created; that is to say, it must specify distinctly all the terms and conditions of the trust. It is true that a resulting trust, or one that arises by operation of law, can be proved by parol. A trustee ex maleficio cannot protect himself under the statute of frauds, but that is a very different case from one where an express trust is sought to be specifically enforced by a court of equity. Counsel for the respondents has fallen into the error of applying the law that relates to trusts of the former kind to this case, and that is shown by the authorities he cites in his brief. An examination of these authorities will show that in every one of them it was the trustee who sought to retain the property against the terms of the trust, and a resulting trust was in fact proven.

It has been held in numerous cases that a deed absolute on its face cannot be shown by parol evidence to have been made in trust for the grantor, and for the good reason that to permit this to be done would be to allow the written instrument to be contradicted by parol evidence. But in the cases cited by respondents, the court

held that the trust relationship between the parties was sufficiently shown by the designation of the grantee as trustee. As soon as that relationship is established, then parol evidence is competent, not for the purpose of establishing the trust, but for the purpose of showing that, the express trust having failed, a trust results in favor of the grantor. It arises by operation of law. But no case has been cited where a parol trust has been specifically enforced by the court, either in favor of the trustor or the trustee. On the other hand, the cases are numerous which hold that any contract concerning land must have all its terms reduced to writing before it can be specifically performed: *Irvin v. Ivers*, 63 Am. Dec. 420; *Ratliff v. Ellis*, 63 Am. Dec. 471; *May v. Cavendor*, 29 S. C. 598; 2 Story's Equity Jurisprudence, § 764; *Pitkin v. James*, 1 Humph. 327 (34 Am Dec. 654); *Atwood v. Cobb*, 16 Pick. 227 (26 Am. Dec. 657); *Mentz v. Nowwitter*, 11 L. R. A. 97, and extended notes.

And the contract cannot rest partly in parol and partly in writing: *Frink v. Green*, 5 Barb. 456; *Stevens v. Cooper*, 1st Johns. Ch. 429; *Watt v. Wisconsin Cranberry Co.*, 63 Iowa, 730; *Sharp v. Rogers*, 12 Minn. 185; *Whitaker v. Vanschoiack*, 5 Or. 113.

For respondents there was an oral argument by *Mr. George E. Chamberlain*, and a brief by *Messrs. Starr, Thomas & Chamberlain*, urging these points:

The deed executed by Christian and wife to J. S. Cooper, trustee, is a sufficient declaration of the trust to take the case out of the statute of frauds, and a sufficient compliance with section 781 of Hill's Code, which provides that "no estate or interest in real property, other than a lease for a term not exceeding one year, nor any trust or power concerning such property, can be created, trans-

ferred or declared otherwise than by operation of law, or by a conveyance or other instrument in writing, subscribed by the party creating, transferring or declaring the same, or by his lawful agent under written authority and executed with such formalities as are required by law." *Waterbury v. Fisher*, 38 Pac. 847; *Calnan v. Johnson*, 34 Pac. 907; *Hall v. Linn*, 5 Pac. 645; *Union Pacific R. R. Co. v. Durant*, 95 U. S. 576; *Duncan v. Jaudon*, 82 U. S. 142; *Shaw v. Spencer*, 100 Mass. 382; 3 Pomeroy's Equity Jurisprudence, § 1409, 103; Browne on the Statute of Frauds (3d Ed.), § 111; Hill on Trustees, 61; 2 Sugden on Vendors (14th Ed.), 437; 1 Perry on Trusts and Trustees, § 78.

But even if the insertion of the word "trustee" in the instrument under which it is claimed the trust was created is not a sufficient declaration of the trust under the statute of frauds, so as to admit parol proof in explanation of the objects and purposes thereof (which we deny), the mere fact that the trust was fully executed and assented to by the parties removes the statutory bar. The rule is, that where the oral agreement has been in good faith so far performed that it is impossible to put the parties in statu quo, or to compensate the doer in damages for the breach of the agreement, and where certain specific acts of part performance have been done, the statute no longer applies, and equity will grant specific performance or give compensation in damages: *Hall v. Linn*, 5 Pac. 645; Browne on the Statute of Frauds, § 483; 3 Pomeroy's Equity Jurisprudence, § 1409, note; *Meach v. Perry*, 1 D. Chip. (Vt.), 191; *W. Va. Oil Co. v. Vinal*, 14 West Va. 637; *Plymale v. Comstock*, 9 Or. 321; *Phillips v. Thompson*, 1 Johns. Ch. 131; *Parkhurst v. Van Cortland*, 14 Johns. 15; *German v. Machin*, 6 Paige, 288; *Colson v. Thompson*, 2 Wheat. 266; *Blum v. Robertson*, 24 Cal. 142; *Wagonblast v. Whitney*, 12 Or. 83; *Brown v. Lord*, 7 Or. 302; *Wallace v.*

Scoggins, 18 Or. 505; *Arnello v. Edinger*, 10 Cal. 150; *Hotchkiss v. Downey*, 2 Day, 225; *Rosenblatt v. Perkins*, 18 Or. 156; *Wilde v. Fox*, 1 Rand. 165; *Kidder v. Barr*, 35 N. H. 235; *Hawkins v. Hart*, 14 Ill. 42; *Eyre v. Eyre*, 19 N. J. Eq. 102; *Putnam v. Hatty*, 24 Iowa, 425; *Kay v. Watson*, 17 Ohio, 27.

The evidence clearly shows that Hirschberg had full and complete notice of the transactions between Christian and Cooper, and between Cooper and Hirschberg, as well as of Thomason's possession of the lands in controversy. But, conceding that he did not have, he was in possession of facts sufficient to put a reasonably prudent business man upon inquiry. With the knowledge, as he admits, that Cooper had some sort of writing from Christian with reference to the land, and of Thomason's possession, the only effort he made to find out the true status of the land alleged to have been purchased by him was to telephone to Dallas about the title and send Christian to the plaintiffs to ascertain the amount of his indebtedness. Under Hirschberg's testimony Christian was his agent, and he was bound by the knowledge which Christian had with reference to the matter: *Baker v. Woodard*, 12 Or. 10; *Whitney v. Burr*, 115 Ill. 293; *The Distilled Spirits*, 11 Wall. 336; *Hart v. Farmers' Bank*, 33 Vt. 252; *Haywood v. Nat. Ins. Co.*, 52 Mo. 181; *Choteau v. Allen*, 70 Mo. 290; *Hovey v. Blanchard*, 13 N. H. 145; *Patton v. Ins. Co.*, 40 N. H. 375; *Mullin v. Mut. F. Ins. Co.*, 58 Vt. 113; *Lebanon Sav. Bk. v. Hallenbeck*, 29 Minn. 322; *Fuller v. Atwood*, 14 R. I. 293; *VanSchoick v. Niagara F. Ins. Co.*, 68 N. Y. 434; *Ingalls v. Morgan*, 10 N. Y. 178; *Flower v. Elwood*, 60 Ill. 438; *Williams v. Tatnall*, 29 Ind. 553; *Wiley v. Knight*, 27 Ala. 336; *Dunlap v. Wilson*, 32 Ill. 517.

Thomason's possession was such notice as to put Hirschberg upon inquiry. By the slightest effort he could have ascertained the exact status of the title to the land

he now pretends to have purchased, and it was his duty to have inquired: *Blain v. Stewart*, 2 Iowa, 378; *Manavdas v. Heilner*, 14 Or. 451; *Musgrove v. Bonser*, 5 Or. 313; *Goodnough v. Warren*, 5 Sawy. 494.

Though the vendee's duty in these contracts generally consists in nothing beyond the payment of money, for which the law would seem to afford a sufficient remedy, yet the vendor has a right in a court of equity to compel him to comply with his agreement by accepting the land and paying for it. And this the vendor may do even though he may have an action at law for the purchase money, where he has shown a full performance on his part according to the spirit and intent of his obligation: *Baumann v. Pinckney*, 118 N. Y. 604; *Burger v. Potter*, 32 Ill. 70; *Andrews v. Sullivan*, 2 Gilman (Ill.), 328; *Haven v. Lowell*, 5 Met. 35; *Old Colony R. Co. v. Scruggs*, 50 Miss. 284; *Paris v. Haley*, 61 Mo. 453; *Stone v. Lord*, 80 N. Y. 60; *Ridge v. Baker*, 57 N. Y. 219; *Craig v. Martin*, 19 Am. Dec. 157; *Willard v. Fayloe*, 8 Wall. 557.

The rule with reference to the necessary parties is, that all parties directly interested in the performance of the contract must be, and all directly and specifically interested in the subject-matter may be, joined as parties: *Gibbs v. Blackwell*, 37 Ill. 191; *Chesman v. Cummings*, 7 N. E. 13; *Bragg v. Olson*, 21 N. E. 519; 22 Am. & Eng. Enc. Law, 1066, n. 6; *Heaviner v. Morgan*, 30 W. Va. 335; Pomeroy's Specific Performance of Contracts, § 483; *Hennington v. Hubbard*, 33 Am. Dec. 426 n.; *Anderson v. Shilling*, 27 Tex. 450; *Morris v. Hoyt*, 11 Mich. 16; *Mfg. Co. v. Wire Fence Co.*, 109 Ill. 73; *Schworer v. Boylston M. Ass'n*, 99 Mass. 285; *Willard v. Tayloe*, 8 Wall. 557.

The connection of Hawley with the subject-matter of the suit appears affirmatively in the complaint, and the objection that he was not made a party was waived by

failing to demur: Hill's Code, § 67, subd. 4, note, and authorities cited.

All who are directly interested in the performance of the contract in this suit were made parties plaintiff or defendant. The deed delivered to Hawley was in escrow, and did not become absolute or effective as a conveyance until the performance of Thomason of his part of the contract. The only recourse of plaintiffs was a suit to compel Thomason to specifically perform: *Gaston v. City of Portland*, 16 Or. 255; *Cannon v. Handley*, 13 Pac. 315.

MR. JUSTICE MOORE, after stating the facts in the foregoing language, delivered the opinion of the court:

I. It is contended by counsel for the appellants that this is a suit to enforce a parol trust in lands, that the deed from Christian and wife to Cooper, "as trustee," failed to declare an express trust, and that parol evidence was inadmissible to explain the nature and purposes of the instrument; while counsel for the respondents maintain that the trust has been executed by the trustee with the consent of the beneficiaries, and, this being so, the bar of the statute of frauds is removed, and the door is opened for the admission of parol evidence to establish the material terms of the trust. The parol evidence admitted at the trial, of which the defendants complain, clearly shows that Christian, being indebted to the First National Bank of Independence on his own account, and as a member of the firm of Klemsen & Christian, entered into a contract with Cooper, who was the president of said bank, by the terms of which he agreed to convey said premises to Cooper, who was to sell the same, and out of the proceeds arising therefrom discharge the obligations of Christian and the firm of which he was a member, including any advances that might be made, and pay the remainder, if any, to Christian; that, in pursuance of this agreement, Christian and wife executed to Cooper, "as trustee," the

said deed, without specifying therein the nature of the trust; that Cooper, with the consent of Christian, entered into a verbal contract with Thomason for the sale of said land; that, in accordance therewith, he, as trustee, made to him a deed thereof, which was deposited with Hawley, and accounted with Christian for the payment made by Thomason; and that the bank, on the faith of the conveyance to Cooper, and the sale by him to Thomason, advanced money to Christian and the firm of Klemesen & Christian. The principal question for consideration is whether this evidence was admissible. If it be conceded that this is a suit to establish a parol trust in lands, it must be admitted that its introduction was in contravention of the statute of frauds, which provides that no trust or power concerning real property can be created, transferred, or declared otherwise than by operation of law, or by a conveyance or other instrument in writing, subscribed by the party creating, transferring, or declaring the same, or by his lawful agent, under written authority, and executed with such formalities as are required by law: Section 781, Hill's Code.

The rule is universal that a parol declaration of a trust will not affect the land, and for this reason parol evidence is inadmissible to establish such a trust. In *Fairchild v. Rasdall*, 9 Wis. 379, the court, speaking of the universality of this rule, say: "We do not feel called upon to cite authorities to show that, in the absence of fraud, accident, or mistake, parol evidence cannot be received to prove that a deed, absolute on its face, was given in trust for the benefit of the grantor." But if it be agreed that the land shall be sold and converted into money, and in pursuance thereof a sale is made, the subsequent declaration of the trust by the trustee will bind the proceeds or the money: 1 Perry on Trusts and Trustees, § 86. The reason assigned for the existence of this rule is that a trust in personal

property may be declared by parol, and a sale of the land by the trustee of a parol trust under an agreement to convert it into money changes the land into personal property, and the subsequent declaration of the trust by the trustee, being supported by the prior agreement to hold the premises in trust, furnishes a sufficient consideration for the enforcement of the declaration: *Hon v Hon*, 70 Ind. 135; *Mohn v. Mohn*, 112 Ind. 285 (13 N. E. 859); *Maffitt's Admr. v. Rynd*, 69 Pa. St. 380; *Wiseman v. Baylor*, 69 Tex. 63 (6 S. W. 743). In *Karr v. Washburn*, 56 Wis. 303 (14 N. W. 189), it is held that a parol trust in land is not absolutely void, but void only at the election of the trustee. The court, speaking of the power and duty of the trustee under a parol trust in lands, say: "He may execute it or not, as he chooses, and the courts will not interfere to compel him to execute it, or to restrain him from doing so. If he refuses to execute it, from thenceforth the trust, which rests only upon a moral obligation, is a nullity." Tested by this rule, it appears that the land in question was converted into personal property by Cooper under a parol agreement to apply the proceeds to the satisfaction of Christian's debts, and that, having executed the trust, he subsequently declared his liability to Christian, and accounted with him for the money received from Thomason. Such a declaration of the trust in personal property rendered Cooper liable to Christian for any balance that might be left after the satisfaction of his debts, and an action could be maintained for its recovery.

2. In such an action parol evidence would be admissible to show the parol declarations of a trust in personal property, and such evidence must be admissible, also, in equity to prove a parol declaration of the trust in land, as a consideration for the subsequent declaration. The deed to Cooper having recited a consideration of \$7,000, the conveyance of the land was either absolute or in trust,

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and, if the latter, the subsequent declaration of satisfaction; but, if the deed is voidable to Christian in satisfaction of the debt, in either case the deed is voidable, as between the parties to the deed.

3. The conveyance to Christian, which must prevail over Hirschberg's deed, is a conveyance, acquired in satisfaction of the debt, and the execution of the deed, that he has the consideration of \$1000, from the evidence which shows account of the purchase of a portion of the land to pay him the balance of the debt. Before Hirschberg's deed, the First National Bank, against him, and was showing that the bank, showing this transaction, that Christian demanded of his individual property, was made for a sum of money, Christian was the foundation of the bank, as to preclude the bank from claiming the debt, based upon a deed, which indebtment was made against

invoke such an estoppel, for the reason that his agreement with Christian was to pay \$6,100 only on account of the purchase of the premises, and hence the amount of Christian's indebtedness to the bank was immaterial. Hirschberg caused the records of Polk County to be searched, and, finding that they showed the title to the property to be in Christian, he accepted the deed; and this want of notice by the record would give him a perfect title, if it were not for the existence of certain facts of which he had knowledge.

Christian testifies that he told Hirschberg he had given him some writing concerning the property, but he did not know the nature or character of the instrument, and, on cross examination, further testifies that Hirschberg told him he had given Cooper a deed of trust. Klemsen, the brother of Christian, says he heard Christian tell Hirschberg he had given Cooper a deed to the land. It also appears that Hirschberg, at the time he was negotiating the purchase, knew that Thomason was in possession of the premises, and had a conversation with him about the payment of his note, but made no inquiry of him in relation to his right of possession. Such possession was sufficient to put a person of ordinary prudence upon inquiry concerning Thomason's right thereto, and was constructive notice of everything to which that inquiry would lead: *Shaw v. Spencer*, 100 Mass. 382; *Bohlman v. Dr.* 313; *Petrain v. Kiernan*, 23 Or. 455 (32 Pac. 1045); a general rule," says BEAN, J., in *Exon v. Dancke*, 30 (32 Pac. 1045), "the authorities declare that open, notorious, and exclusive possession and occupation by a stranger to the title is sufficient to put a purchaser from a vendor out of possession upon inquiry as to legal and equitable rights of the party in possession." *Well v. McElroy*, 36 Cal. 268, the court, discussing the question, says: "He cannot be regarded as a pur-

chaser in good faith who negligently or willfully closes his eyes to visible, pertinent facts, indicating adverse interest or incumbrances upon the estate he seeks to acquire, and indulges in possibilities or probabilities, and acts upon doubtful presumptions, when, by the exercise of prudent, reasonable diligence, he could fully inform himself of the real facts of the case." We must, therefore, conclude that Hirschberg, at the time of his purchase, had constructive notice of the unrecorded deed to Cooper, if not actual knowledge of the fact, and that his title must be subordinate to the equities created by the prior deed. We are strengthened in this conclusion by the fact that Hirschberg's deed recites a consideration equivalent to the amount evidenced by Thomason's note, and the further fact that Hirschberg, soon after obtaining his deed, served on Thomason a written notice that this note was payable to him at its maturity. These circumstances tend in no small degree to show that Hirschberg knew of and acquiesced in the sale made by Cooper.

4. The next question for consideration is whether a court of equity can compel Thomason to specifically perform his oral contract of purchase. In discussing this question, it may be well to consider whether Thomason could compel a specific performance of the contract. The deed executed by Cooper, as trustee, to Thomason, and deposited with Hawley, did not contain the terms of the verbal agreement to convey the premises, and in such case it has been held that a deed deposited in escrow, unless it contained a memorandum of the agreement, was inoperative to take the case out of the statute of frauds: *Kopp v. Reiter*, 146 Ill. 437 (34 N. E. 942). The payment of the purchase price is not such a part performance of an oral contract to convey land as to overcome the plea of the statute, but possession in pursuance of the terms of the contract, and improvements made upon land, are sufficient for that

purpose. When possession, in pursuance of the terms of a verbal agreement to convey land, has been taken by the purchaser, he thereby acquires an equitable estate in the premises; and his notorious occupation thereof is such evidence of his equitable title as to overcome the statute, and renders parol proof admissible to establish the terms of the verbal contract upon the faith of which he has acted. Applying this rule to the case at bar, the evidence shows that Thomason, relying upon the validity of the contract made with Cooper, took and retained the possession of the land, and has made valuable improvements thereon. He alleges that he has been damaged in the sum of \$1,000, but the evidence fails to show the value of the improvements made by him. It is the universal rule that courts of equity will enforce a parol contract relating to land within the statute of frauds when the refusal to execute it would amount to practicing a fraud: *Browne on the Statute of Frauds*, § 438. Where one party has done acts in part execution or upon the faith of the contract, with the knowledge and consent of the other, this will take the case out of the statute: *Brown v. Lord*, 7 Or. 302; *Plymale v. Comstock*, 9 Or. 321; *Wagonblast v. Whitney*, 12 Or. 83 (6 Pac. 399); *Wallace v. Scoggins*, 18 Or. 502 (17 Am. St. Rep. 749, 21 Pac. 558).

5. It is the equitable estoppel created by force of the acts, or silent acquiescence of the party who would plead the statute of frauds, that prevents him from doing so. There is no doubt that Thomason in a court of equity could have compelled the specific performance of the contract, had he instituted a suit for that purpose; and, this being so, can the plaintiffs enforce the contract against him? To entitle a party to invoke the aid of equity for the enforcement of a verbal contract to convey real property the acts relied upon as part performance to take the case out of the statute must have been done by the

plaintiff himself: Browne on the Statute of Frauds, § 453. It is the possession by the purchaser, in pursuance of the terms of the contract, that entitles him to the specific performance, and, upon the theory of the mutuality of the contract, it is held that the owner should have a right to enforce its terms when he has delivered possession: *Pugh v. Good*, 3 Watts & S. 56; Waterman's Specific Performance of Contracts, § 15; Browne on the Statute of Frauds, § 471. The deed to Cooper transferred the legal title which drew after it the possession (*Swift v. Mulkey*, 14 Or. 64), and this Cooper, with the consent of Christian, delivered to Thomason. The bank also, relying on the faith of the agreement, advanced money to Christian and to the firm of which he was a member, and, while the payment of the money is not such part performance of a verbal contract as to take the case out of the statute, yet, taken in connection with the delivery of the possession by Cooper as agent for the bank, it was in execution and amounted to a part performance of the terms of the contract on the part of all the parties to and interested in it, and, as Thomason could compel a specific performance of the contract to convey, the plaintiffs for like reasons are entitled to a mutuality of remedies, and can invoke and obtain the aid of a court of equity to compel the specific performance of the agreement to purchase.

6. It is contended that the decree is inoperative in that it requires Cooper to cause Hawley, who is not a party to this suit, to deliver the deed deposited with him to Thomason upon the payment of said note, or, upon the failure of Hawley to so deliver it within thirty days, that Cooper execute to Thomason a new deed, or, if Cooper neglect or refuse to do either within thirty days from the default of Hawley, that the decree operate as and for a deed to Thomason. It is alleged in the complaint that Hawley had offered and was ready and willing to deliver

the deed to Thomason upon the payment of the note, and this fact is not denied in the answer. The objection to this part of the decree must prove unavailing, for the defendants, knowing that Hawley was not a party, did not demur for defect of parties. This defect was apparent upon the face of the pleading, and the defendants, by failing to demur, have waived their objection to the non-joinder: Section 71, Hill's Code.

7. Besides, Thomason is the real party in interest, who is affected by this portion of the decree, and, not having appealed therefrom, it must be presumed he is satisfied therewith. It follows that the decree is correct.

AFFIRMED.

Mr. Justice WOLVERTON, having been of counsel in the trial in the court below, took no part in the trial or decision here.

Argued July 2; decided November 9, 1896; rehearing denied.

OSMUN v. WINTERS.

(46 Pac. 780.)

1. AMENDMENT OF PLEADINGS—DISCRETION OF COURT.—Where a motion for leave to file an amended answer is called up the day before the time set for a second trial of the case, and the proposed amendment tenders a new issue, it is within the discretion of the court whether or not to allow the motion, and no abuse of such discretion seems to have occurred in this case.
2. BREACH OF PROMISE—EFFECT OF FAILING TO PROVE CHARGES IN ANSWER.—On a trial for breach of a marriage promise, an unproved charge of plaintiff's unchastity, made in the answer, may be considered in connection with all the rest of the evidence in aggravation of damages, as tending to show that defendant was actuated by malice: *Kelly v. Highfield*, 15 Or. at page 278, cited and followed.
3. IDEM.—On a trial for breach of a marriage promise, where no proof of defendant's allegations against the character of plaintiff has been offered, it is not error to charge that, where defendant fails to prove such allegations, "it is a worse case than if there had been a simple denial of the contract of marriage, and the action had proceeded on the simple allegations and denials."

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4. **BREACH OF PROMISE—EVIDENCE.**—A resolution of a society to which both the plaintiff and defendant in an action for breach of a promise of marriage were members, congratulating them upon their supposed marriage, and directing a copy thereof to be forwarded to them, is admissible in proof of the promise of marriage, since it tends, though remotely, to show a relationship consistent with the plaintiff's claim of an engagement.
5. **EVIDENCE—AGGRAVATION OF DAMAGES.**—On a trial for breach of a marriage promise, an article published over defendant's signature, attacking plaintiff's character, and an insulting letter addressed by defendant to plaintiff, both written after the commencement of the action, are admissible as tending to prove the animus of defendant in refusing to perform the marriage contract, and may be considered in aggravation of damages: *Kelly v. Highfield*, 15 Or. 290, applied.
6. **COMPETENCY OF EVIDENCE OF CO-CONSPIRATOR.**—Where it is claimed that a conspiracy existed between certain persons, the statements of one of them touching the conspiracy, not made in the presence or hearing of the others, and not shown to have been authorized by them, are not admissible against the other alleged conspirators: *Sheppard v. Yocum*, 10 Or. 402, cited and followed.
7. **DISCRETION AS TO CROSS EXAMINATION—CODE, § 837.**—Where the cross examination of a party goes to matters outside his examination in chief, but which are pertinent to his adversary's cause, and might have been introduced by him in the first instance, such examination becomes subject to the rules that would govern a direct examination on his own account (Code, § 837), and it is discretionary with the court whether the testimony shall be introduced then and in that manner: *Long v. Lander*, 10 Or. at page 178, cited.
8. **EVIDENCE—WAIVER OF PROOF.**—A stipulation that a letter favorable to the adverse party may be read to the jury upon the condition that a deposition favorable to the stipulating party, but which was objectionable on account of certain irregularities, should also go in evidence, is not an admission that the letter is genuine, but merely dispenses with proof of its genuineness in the first instance.
9. **MISCONDUCT OF JURORS—WAIVER OF OBJECTION.**—A party who by himself or his attorney is aware of the misconduct of a juror during the trial, and while the cause is yet in the hands of the jury, but does not bring it to the knowledge of the court and ask to have the jury discharged or recast, cannot make it a ground of a motion for a new trial.
10. **EXCESSIVE DAMAGES—SPECIFICATION OF ERROR.**—The question of excessive damages cannot be raised on appeal unless specified as a ground of error in the notice of appeal.

From Multnomah: E. D. SHATTUCK, Judge.

Action of damages for breach of a contract of marriage, brought by May Osmun against H. D. Winters.

There was a verdict for plaintiff for \$10,500, which was reversed in this court. 25 Or. 260 (35 Pac. 260). On a second trial the jury disagreed, but on a third trial there was a verdict of \$9,000, from which this appeal is taken.

AFFIRMED.

For appellant there was a brief over the name of *Watson, Beekman & Watson*, with an oral argument by *Mr. Edward B. Watson*.

For respondent there was a brief over the names of *Flegel & Stanislawsky, McGinn, Sears & Simon*, and *Patrick J. Bannon*, with an oral argument by *Messrs. Alfred F. Sears, Jr.*, and *Austin F. Flegel*.

Opinion by MR. JUSTICE WOLVERTON.

1. This is an action to recover for breach of a promise of marriage. The facts, sufficient for an understanding of the points decided, appear in the opinion. Error is predicated of the action of the court below in overruling defendant's motion, based upon his affidavit, for leave to file an amended answer, and also in overruling a subsequent motion to strike out certain portions of the original answer. The points of divergence between the original and the proposed amended answer arise in the further and separate defenses interposed. The answer sought to be filed contains a separate defense, in substance the same as the original, except that the allegations of plaintiff's lascivious cohabitation with one Deville Dodge and one W. E. Duffer are eliminated, and a further separate defense alleging the prior marriage of the plaintiff with one Fred Osmun, and a want of knowledge or information sufficient to form a belief as to whether said marriage had been legally dissolved. The cause had been once tried, and the motion was called up the day before the time set for a second

hearing, and, the amendment having tendered a new issue which would require additional evidence to support or overcome, we think it was within the sound discretion of the court below whether or not to allow the motion. Courts are usually liberal in granting leave to amend in furtherance of justice; but, unless it is apparent that justice would be subserved by the amendment, it is not an abuse of discretion to refuse its allowance. The motion to strike out goes simply to the allegations touching plaintiff's conduct with Dodge and Duffer. It appears by the affidavit filed with the first motion that defendant had failed on the former trial to prove these allegations to his satisfaction, and the purpose of the motion to strike out was to get rid, so far as possible, of their damaging effect as false imputations against the character and chastity of plaintiff. The court below, having heard the testimony at the former trial, taken in connection with the affidavit and the conduct of the defendant, was able to judge whether said allegations were made in the first instance in good or bad faith, and upon reasons drawn from these observations we presume the court's action was based. We cannot say that there has been an abuse of discretion in disallowing this motion, and error in this respect is not well assigned.

2. In this connection the court instructed the jury that "The defendant in a case of this kind may allege the bad character and bad conduct of the plaintiff, but he does so always at his peril. What I mean by that is that he may assert it and prove it. He may claim that plaintiff had a bad character and bad reputation, and he may prove it, if he can; but if he fails to prove it, it may be taken as a repetition of the charge of unchastity, and may be considered by the jury in connection with all the rest of the testimony in aggravation of damages. In other words, it is a worse case than if there had been a simple denial

of the contract of marriage, and the action had proceeded on the simple allegations and denials." It is claimed that, besides laying down an erroneous rule of law touching the ascertainment of damages in the action, this instruction was especially injurious to the defendant in view of being held to his former answer. The ruling upon the motion to amend by striking out was but a step in the trial, and, if the court was right in the disallowance of the motion, it was right in instructing the jury touching the effect of the unproved allegations which the motion sought to eliminate. Defendant offered proof of the truth of one of such allegations, but as touching her alleged conduct with Dodge there was no attempt at proof, nor did he claim anything for it in the argument before the jury. This was the condition of the case when it became the duty of the court to instruct the jury, and it was not error to instruct with reference to such condition. Aside from this, the answer contains other allegations imputing immoral conduct to the plaintiff with other men besides Dodge and Duffer, and of her bad character in general. It was, therefore, pertinent to so instruct the jury generally touching the effect and lack of proof of such allegations as matter of defense. Was the instruction proper as it respects the aggravation of damages? An instruction of almost identical import was approved by this court in *Kelly v. Highfield*, 15 Or. at page 290 (14 Pac. 744). The ground upon which a false charge of unchastity, assigned as a reason for breaking off the marriage engagement, may be considered in aggravation of damages is that it shows the animus attending the severing of such relations. No damages should be allowed for the defamatory words, but they should be considered as tending to show that the defendant was actuated by malice, that he broke off the engagement wantonly and insolently, and with a bad and wicked heart, and in a manner well calculated to wound

the feelings, injure the reputation, and destroy the future prospects of the affianced. So, if the charge is repeated by spreading it upon the records in the cause after action begun, without justifying it by proof at the trial, it is a proper element for consideration in aggravation of damages, upon like principle as a repetition of slanderous words in the pleadings in an action for slander, unless sustained, may be considered as proof of the malice which prompted the defendant to give currency to the slander in the first instance. The action for breach of promise of marriage, while founded upon contract, is, in its nature, an action for tort or a wrong done the plaintiff; and, if it becomes manifest that the defendant has been actuated by motives of an evil intent to wantonly and ruthlessly humiliate and injure the plaintiff, a case is made for the assessment of punitive or vindictive damages, which may operate as a punishment in the interest of society as well as for the doing of a willful personal injury to a fellow mortal: *Johnson v. Jenkins*, 24 N. Y. 252; *Thorn v. Knapp*, 42 N. Y. 474 (1 Am. Rep. 561); *Davis v. Slagle*, 27 Mo. 600. The court, as we think very properly, told the jury that such an unproven charge of unchastity might be considered in connection with all the rest of the testimony in aggravation of damages.

3. It is further contended that the instruction is faulty in characterizing such a case as being worse for the defendant than if there had been a simple denial of the contract of marriage. The court simply told the jury what was the fact under the law. The breach, attended with an unfounded charge of unchastity, or an unsuccessful attempt to justify such a charge, is certainly a worse case than if there had been a simple refusal to carry out the marriage contract unattended with such an imputation, because in itself it affords the very grounds for the aggravation of damages. There is no intimation as to what

the damages should be. The two kinds of cases are simply put in comparison as a method of explaining to the jury when and under what circumstances they should, and the conditions under which they should not, visit the defendant with aggravated damages. The jury could not have understood that they should increase the damages at any rate. That was a matter left for them to determine under the testimony. The objection is not well taken.

4. During the progress of the trial plaintiff introduced and had read to the jury, over the objections of defendant, certain resolutions which were adopted by Fairview Lodge, No. 560, I. O. G. T., June 26, 1892, of which lodge plaintiff and defendant were members, purporting to extend to them the congratulations of the lodge upon their supposed marriage, a copy of which was directed to be forwarded to them. The ruling of the court in this regard is assigned as error. The reasons assigned for the objection are that the resolutions do not appear to have been prompted by any conduct observed between the parties, but upon information which proved to have been false, and that it was incompetent for the purpose of proving an executory promise of marriage. The evident object of this testimony was to show that a closer intimacy than the ordinary relations of friendship, such as usually exist between members of fraternal societies, obtained between the parties. It is altogether improbable that unless such intimacy had been previously observed the lodge would have been so ready to adopt the resolutions, without definite knowledge of the supposed fact upon which they were based. The acts of the parties probably gave coloring to the reported marriage, as it is apparent from the resolutions that they were attentive and active members of the order. So that they have some tendency, remote and inferential though it may be, to show an existing relationship consistent with their engagement, and how their

demeanor towards one another was regarded among their friends and associates. In this view they corroborate in some small measure the proof offered by the plaintiff of the existence of the engagement between them at that time.

5. After the commencement of the action, the defendant made a statement to which he subscribed, and had it published in the Portland Chronicle, in reply to an article which had previously appeared in the Sunday Mercury. In the course of this statement he makes use of language as follows: "They (the Mercury people) prepared to espouse the cause of the notorious woman (the plaintiff) who knows their characters, and who informed me herself that one of the proprietors of the Mercury was guilty of a much more flagrant offense than she charges me with." "As to the published statement concerning my relations with Mrs. Osmun, they are based on her charges, and are nearly all false. In the first place, she is not the Miss, but a divorced woman of a man in Chicago, who secured a divorce on the grounds of her having been false to him, and thereby contracted and communicated to him a bad disease." "When I first became acquainted with her (the plaintiff) it was through her uncle and aunt coming into my building and opening a bakery. For some time I supposed she was a respectable woman, and in time I saw by her conversation, her conduct with other men, and by what men told me, that she was not a virtuous woman. In fact, she told me that she was not virtuous, and I have the sworn statement of one man, given voluntarily, that the first time he ever met her was on the street, that he winked at her, and she gave him the sign to follow, and he spent the night with her at an hotel." This published statement went to the jury over the objections of defendant. We think it was properly admitted as tending to show the animus of defendant in refusing to perform the marriage contract, upon like grounds as unproved

allegations of unchastity in the pleadings may be considered in aggravation of damages.

For like reasons the insulting letter addressed by defendant to plaintiff after the commencement of the action was properly admitted. We are aware that there are good authorities against the admission of the statement and this letter in evidence. The reasons upon which they proceed are that they involve matters or transactions occurring subsequent to the commencement of the action, which should not be permitted to contribute to an increase of damages above such as were contemplated by the plaintiff when the action was begun (*Leavitt v. Cutler*, 37 Wis. 46; *Greenleaf v. McColley*, 14 N. H. 303), and because they require the consideration of an independent tort: 2 Sedgwick on Damages, § 640, note 1. But if we are right in our position that an unfounded charge of unchastity incorporated in the answer is cause for aggravation of damages, then, logically, these authorities are wrong: 3 Sutherland on Damages, 321, note 3. STRAHAN, J., in *Kelly v. Highfield*, 15 Or. 290 (14 Pac. 794), says: "There can be no doubt, if the defendant's desertion of the plaintiff was without cause, or his conduct at the time toward her, or afterwards, was harsh, cruel, or malicious, or if at any time, even upon the trial, he makes a wrongful attempt to blacken her name or reputation, the jury have a right to consider it, and may, if they think proper, add something to the amount of damages on account of such new or additional wrong." So, in this case, if the contractual relations were wantonly broken off by the defendant, and he afterwards willfully and maliciously persisted in casting imputations against the plaintiff's character through the public press, and by inditing to her indecent and insulting letters, whether done before or after the commencement of the action, such acts may be considered as a reflex of the defendant's wicked incentive for severing

such relations, and taken into account by the jury in awarding damages.

6. There was some evidence introduced by defendant tending to show that prior to the alleged breach a conspiracy had been entered into between the plaintiff and one M. J. Santry to blackmail the defendant, and to extort money from him by means of this litigation. Whether or not there was a prima facie case of conspiracy sufficient to go to the jury we are not called upon to decide. It is sufficient to say that all the evidence offered to establish such alleged conspiracy was submitted to them, except certain admissions and acts of Santry, the rejection of which is assigned as error. Dr. C. E. Hill, while a witness for defendant, after testifying to having overheard some parties, in the presence of the plaintiff and Santry, narrate some "rather smutty" stories, was asked a further question, which was objected to, and defendant's counsel stated: "We propose to prove by this witness that Santry, about this time and after this time, claimed to be interested in this litigation, and to have a part in it, and claimed that they were to divide whatever they should get out of Winters." Later on counsel, addressing the witness, said: "You may state whether or not, on or about that time, you heard Santry state what the agreement between him and Mrs. Osmun was, with regard to dividing the money they should get out of Mr. Winters." This is enough to elucidate the nature of the testimony sought to be elicited. It relates simply to admissions and statements of Santry, while not in the presence of plaintiff, touching the supposed conspiracy that had been entered into between the parties to extort money from Winters. As it respects such testimony, the rule seems to be as laid down in *Metcalf v. Connor*, 12 Am. Dec. 340, as follows: "Any declarations by one of the party at the time of committing the unlawful act, are, no doubt, not only evidence

against himself, but, as being a part of the *res gestae*, and tending to determine the quality of the act, are also evidence against the rest of the party, who are equally as responsible as if they had themselves done the act. But what one of the party may have been heard to say at any other time as to the share which others had in the transaction, or as to the object of the conspiracy, cannot be admitted as evidence to affect them, for it has been solemnly decided that a confession is evidence only against the person himself who makes the confession, and not against others." This rule is explicitly sanctioned and upheld in *Sheppard v. Yocum*, 10 Or. at page 417, and authorities there cited. See also *Miller v. Barber*, 66 N. Y. 558, 567. And it amply supports the action of the court below. Winters was asked, while a witness in his own behalf, whether or not Santry came to him after the action was commenced, claiming to have the authority, and proposed to settle the case for a certain amount, and represented that plaintiff would accede to the terms indicated; and it is claimed that the refusal to permit him to answer was also error. But the evidence which the question indicates might be elicited does not appear to be such as would establish acts in the execution of the alleged conspiracy, and, besides, the action had been commenced, and was then in the hands of her attorneys, and it is not shown that Santry was authorized to compromise with the defendant.

7. It is claimed that in the cross examination of the defendant, while a witness in his own behalf, plaintiff's counsel was permitted to examine him touching things entirely outside of and beyond the matters inquired of on his examination in chief; that is to say, plaintiff was allowed to interrogate the witness in respect to shorthand notes of his testimony given at a former trial, which was not germane to the direct examination at the present trial.

The inquiry, however, went to matters which were pertinent to plaintiff's cause, and might have been introduced by her in the first instance. If she exceeded the proper bounds of cross examination, the testimony became as much her own as if introduced by her. Such examination became subject to the same rules as a direct examination upon her own account; Hill's Code, § 837. It was discretionary with the lower court whether the testimony should be introduced then and in that manner: *Long v. Lander*, 10 Or. at page 178. It was, perhaps, irregularly gotten to the jury, but we cannot see that the course which the court allowed to be pursued substantially affected any of defendant's rights. Possibly it may have been proper for impeachment. This, however, we do not decide, as it does not appear to have been introduced for that purpose.

8. During the trial the defendant offered in evidence a letter in pencil addressed to defendant's attorneys at Chicago, and purporting to have been written by the plaintiff's former husband, of which the following is a copy:

"CHICAGO, January 29th, 1893.

Ferguson & Goodnough.

Dear Sirs: I think I can do better on the other side of the fence. I got a letter the other day to that effect.

Yours,

FRED A. OSMUN."

It was introduced for the avowed purpose of explaining the averment in the answer, "that at various times in the year 1891, at Chicago, Illinois, and at Pontiac, Michigan, the plaintiff was guilty of lewd and lascivious cohabitation with Deville Dodge," and his failure to offer any evidence in support of said averment. Counsel for plaintiff had objected to the introduction of this letter, but at this time they agreed with counsel for defendant that it might be read to the jury upon condition that a certain deposition of

the said Fred A. Osmun, which had been taken in behalf of defendant, but which on account of some irregularity was subject to objections, should also go in evidence, so both the letter and the deposition went to the jury. At the argument, one of plaintiff's counsel sought to impeach the genuineness of the letter by a comparison, in the presence of the jury, of the handwriting and the signature with the signature contained on each page of the deposition, to which procedure the defendant objected, but was overruled by the court, and the question as to the authenticity and genuineness of said letter and signature was submitted to the jury. Defendant contends that, as the plaintiff agreed to allow the letter to be read to the jury, she was estopped to question its genuineness, and that the court erred in permitting her to do so, and that it further erred in submitting the question to the jury upon a simple comparison of the handwriting. The controversy, judging from the record, appears to us about like this: Defendant was seeking to introduce the letter for a purpose which would go to his advantage. The deposition of Osmun had been taken, and might have been introduced by either party, providing the certification and transmission were regular, but they were not, as it appeared. This deposition was supposed to be favorable to plaintiff, but the letter does not appear to have been made a part of it. So that the agreement was but a mutual concession that defendant might introduce the letter, and the plaintiff the deposition, as the evidence of the respective parties. As to the letter, it was simply a waiver of the observance of the rules touching proof which would identify and qualify it as proper to go to the jury, but not an admission that it was the genuine letter of Osmun. This is the view the court below took of the situation and we believe it to be correct. Nor did the court err in submitting the question whether or not the letter is genuine to the jury. Evidence respecting

handwriting may be given by comparison, made by a witness skilled in such matters, or by the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered: Hill's Code, § 765. No question was raised as respects the signature to the deposition. It was admitted to be Osmun's genuine signature, and it was proper to submit the question touching the genuineness of the letter to the jury upon their comparison of the handwriting with the signature to the deposition.

9. After verdict and before judgment, the defendant moved for a new trial, based principally upon the ground of the misconduct of two of the jurors during the trial. The motion was supported by affidavits and opposed by counter affidavits. It appears that the misconduct complained of occurred October 25, and was observed at the time by one of defendant's counsel, but the verdict was not rendered until October 29. The court below overruled the motion, and refused a new trial, and its action in this regard is assigned as error. The respondent contends, first, that an order refusing a new trial is not reviewable on appeal; and, second, it was not error to disallow the motion. Waiving the first question, the matter may be disposed of on the second. Assuming that the misconduct of the jurors was sufficient to disqualify them from further participating in the trial, we think the objection came too late. The acts complained of were committed some four days prior to the rendition of the verdict, and while the cause was yet in the hands of the jury. The defendant was cognizant of such acts all the while, and should have brought them to the knowledge of the court at once, and had the jury discharged or recast. By taking his chances before jurors, whom he declares to have been disqualified, when he could have had a hearing before verdict, he has waived the objection. SHIPPEN, J., in *Berry v. DeWitt*, 27 Fed. 724, says: "Such misconduct of a juror during

the trial, if known to the party at the time of its occurrence, and not made the subject of a motion to the court, is waived. A party cannot know, during the trial, a fatal objection arising from the misconduct of a juror upon the trial, and keep silence, and take advantage of it in the event of an adverse verdict. He is not permitted to speculate upon the chances of a verdict." This doctrine is supported by numerous cases, and appears to be well settled: See *State v. Tuller*, 34 Conn. 280; *Consolidated Ice-Mach. Co. v. Trenton Hygeian Ice Co.*, 57 Fed. 901; *Cogswell v. State*, 49 Ga. 103; *Martin v. Tidwell*, 36 Ga. 345; *Stampofski v. Steffens*, 79 Ill. 306; *Hussey v. Allen*, 59 Me. 269; *Rowe v. Canney*, 139 Mass. 41 (29 N. E. 219); *Koester v. City of Ottumwa*, 34 Iowa, 41; *Gurney v. Minneapolis Ry. Co.*, 41 Minn. 223 (43 N. W. 2); *Hill v. Greenwood*, 160 Mass. 256 (35 N. E. 668).

10. The question made touching excessive damages not being specified as a ground of error in the notice of appeal, cannot be examined here, even if it was otherwise competent for this court to consider it. There are other exceptions to instructions given by the court, and to others asked and refused. The former opinion rendered in this case (25 Or. 260, 35 Pac. 25), is decisive of two of them, to wit: the effect of seduction as an element in the aggravation of damages, and the question touching the alleged seduction by means of force and violence. This latter was a question for the jury, and was properly submitted to their consideration. The others we have carefully examined, and find that the court below is not in error regarding them.

AFFIRMED.

NUMBER 12: decided November 9, 1896.

DAVIS v. HANNON.

(46 Pac. 785.)

ARGUED DURING TRIAL—DISCRETION—CODE, § 101.—In an action by an officer to recover damages for selling the property of a defendant on an execution against another, where the defendant denies plaintiff's ownership, it is within the discretion of the trial court, and is not a substantial change in the law, to add to the section 101 of Hill's Code, to permit defendant to introduce evidence during the trial by adding an allegation that plaintiff fraudulently obtained and held the property in question: *Foster v. Henderson*, 210, cited and approved.

BY BAKER: ROBERT EAKIN, Judge.

Plaintiff seeks to recover the possession of certain personal property. The facts are fully set forth in the opinion. Plaintiff prevailed, and from a judgment against him he appeals.

AFFIRMED.

For appellant there was a brief over the name of King & Norton, with an oral argument by Mr. Will R. King.

For respondent there was a brief over the name of Hyde & Mackwood.

Opinion by MR. CHIEF JUSTICE MOORE.

This is an action by C. C. Davis to recover the value of personal property seized and sold upon execution. The plaintiff alleges that the defendant Hannon is the duly elected, qualified, and acting constable of Huntington Precinct in Baker County, and that the defendants Degel and Fifer are sureties on his official undertaking; that a judgment having been duly rendered in the justice's court of said precinct in favor of one W. J. Woods, and against R. D. Gorby and W. M. Gorby, partners as Gorby Brothers.

an execution was issued thereon, in pursuance of which Hannon, as constable, levied upon and sold the property in question, which was of the value of \$500; that at the time of such levy plaintiff was the owner, and entitled to, and in the possession of, said property, and that by reason of such seizure and sale he had been damaged in the sum of \$500, for which he demanded judgment. The answer denied only the allegations of ownership, possession, and value of the property; but at the trial, after the plaintiff had testified that he was the owner and in the possession of the property at the time it was seized, and had introduced in evidence a bill of sale executed by said R. D. Gorby, evidencing the transfer of the title to him, the court, upon motion, over plaintiff's objection, granted the defendants leave to amend their answer by adding thereto an allegation that the pretended sale was without consideration, and fraudulent as to the creditors of Gorby, and made with intent to hinder, delay, and defraud Woods, the plaintiff in said writ. The reply having put in issue these allegations of new matter, trial was had, resulting in a verdict and judgment in favor of the defendants, from which the plaintiff appeals.

The only question presented for consideration is whether the court, at that stage of the case, possessed the power to allow the amendment complained of, for, if it had, the allowance of the motion was a matter within its discretion, which will not be reviewed on appeal unless it affirmatively appears that there was a plain abuse of such discretion, to the manifest injury of some substantial right of the appellant: *Henderson v. Morris*, 5 Or. 24; *Baldock v. Atwood*, 21 Or. 73 (26 Pac. 1058); *Garrison v. Goodale*, 23 Or. 307 (31 Pac. 709); *Foster v. Henderson*, 29 Or. 210 (45 Pac. 899). Section 101, Hill's Code, as far as it applies to the question at issue, authorizes the trial court, in furtherance of justice, and upon such terms as may be proper, at

any time before the cause is submitted, to allow any pleading to be amended, when such amendment does not substantially change the cause of action or defense, by conforming the pleadings to the facts proved. The plaintiff would have to prove, under the issue made by the original answer, that he was the owner and entitled to the property in question, while the defendant might give in evidence any facts that tended to disprove such ownership and right of possession. The amended answer, however, conceded that the plaintiff was the owner, as against all persons except the creditors of Gorby, and as to them the defendants assumed the burden of proving that the plaintiff's title was fraudulent. Fraud having been alleged in the amended pleading, different evidence from that required under the original answer was necessary to establish it; and, while this may be the test of a new issue, the question arises, Did the amendment substantially change the defense? The original answer denied the plaintiff's title altogether, and, if the proof had sustained the defendants' theory, it would have defeated the action. The amended answer conceded that plaintiff had the evidence of title, but alleged that it was fraudulent as to the plaintiff in the execution under which the property was seized and sold, and, the proof having sustained this issue, plaintiff's title necessarily failed. In each instance plaintiff's title was attacked, and, while different evidence was demanded to sustain the allegation of fraud, we do not consider the amendment wrought a substantial change in the defense.

In *Baldock v. Atwood*, 21 Or. 73 (26 Pac. 1058), the plaintiff, after the evidence was all taken, by leave of court, filed a second amended complaint, containing a number of allegations not found in either the original or first amended complaint, and it was contended that the amendment was in effect the substitution of an original complaint, setting up a new and entirely different cause of

suit, but STRAHAN, C. J., in deciding the case, says: "The amendment does not change the controversy. The suit still is in relation to the water alleged to have been appropriated by the plaintiff, and his right to have it flow to and upon his land. This is the real gist of the suit. Any amendment of the pleadings which would further support this right might be permitted by the court in furtherance of justice; so, also, any amendment of the answer which tended to defeat the cause of suit set up by the plaintiff might be allowed the defendant on the like terms." The purpose of the amendment in the present case having been to conform the pleading to the facts proved, and such amendment not having substantially changed the defense, the power of the court, under the statute, to allow it is unquestioned. If the defendants, relying upon their belief that the title to the property in question was in Gorby, denied the allegations of plaintiff's ownership, and went to trial on that issue, during which they should ascertain that plaintiff had the evidence of title thereto, to have refused them leave to amend their answer on discovering that fact would seem like a denial of justice. The plaintiff did not ask for a continuance in consequence of the amendment, and from this it must be inferred that he thought he was prepared to meet the new issue. The court having the authority, and there being no abuse of discretion in allowing the amendment, it follows that the judgment is affirmed, and it is so ordered.

AFFIRMED.

Decided November 9, 1896.

JORY v. PALACE DRY GOODS CO.

(46 Pac. 786.)

30	196
40	286
30	196
45	407
45	426

1. **SUFFICIENCY OF DESCRIPTION IN TAX DEED—CODE, § 2773.**—The correct interpretation of section 2773, Hill's Code, is that if land is so situated that it cannot be definitely described by legal subdivisions, or by lots and blocks, it must be described in some other manner that will make its location certain. Measured by this rule, a description in an assessment roll and in a tax deed as a "fraction of lot 2 in block 49," for example, is so indefinite that it entirely fails to identify any parcel of land whatever, and is absolutely meaningless.
2. **RECOVERY OF AMOUNT PAID BY PURCHASER AT TAX SALE—HILL'S CODE, § 2821.**—The provision of our code (section 2821) that when the holder of a tax title sues for the land described in his tax deed, the owner must deposit in court the amount paid for the tax deed, with interest, etc., as a condition precedent to filing his answer, is supported on the theory that the tax purchaser has acquired the lien of the county for the tax, and that, the purchaser having paid to the county by his purchase a just obligation of the citizen's, the latter ought to repay him before getting the lien released; but where the tax itself is void, or where the assessment is so irregular that it is impossible to say what property is intended to be affected by it, no lien is created; and consequently the tax purchaser can acquire none. In such cases the owner need not make any tender with his answer.

From Marion: GEO. H. BURNETT, Judge.

This is an action by William Jory against the Palace Dry Goods & Shoe Co., to recover possession of the undivided one-half of 22 feet and 7 inches by 165 feet of lot No. 2, block 49, in the City of Salem, Marion County, Oregon, more particularly described as "Beginning at a point 45 feet and 2 inches south of the southeast corner of the building now known as the First National Bank Building, and running thence west, parallel with the south wall of said bank building, 165 feet to the alley; thence north, parallel with the alley, 22 feet and 7 inches; thence on a straight line east to the place of beginning." The complaint is in the usual form. The defendant, after putting in issue the

ownership and right of possession, as a further defense alleges ownership in one R. Livingstone, and that defendant is a tenant under him; that plaintiff's pretended title is based upon a certain tax deed, a copy of which is made a part of the answer. The property attempted to be conveyed thereby is described as "Salem fraction of lot No. 2 in block No. 49. Salem lots Nos. 4, 5, 6 and 7, block No. 49, together with all and singular the tenements," etc. The deed purports to be based upon a sale for delinquent taxes levied upon the property therein described for the year 1890, in the name of W. N. Ladue, from whom R. Livingstone derails his title. It is further alleged that Ladue fully paid and discharged all taxes levied upon the premises described in the complaint for the year 1890, long prior to the pretended tax sale. It is admitted by the reply that the answer sets out a correct copy of the tax deed, and that plaintiff claims title by virtue thereof; but the allegation that Ladue paid the taxes for 1890 prior to the sale is denied. The reply further states affirmatively that before the commencement of this action Ladue deeded the premises in controversy to Livingstone, but that the latter had full knowledge and notice of plaintiff's title at the time, and "that plaintiff paid, on the 27th day of June, 1891, the sum of \$133 to the sheriff of Marion County, Oregon, as the consideration for such deed, the same being the amount of taxes delinquent against the lands in question herein, but the defendant, or the said Ladue, or said Livingstone, has not paid the same nor any part thereof, nor offered to do so." A motion was interposed by defendant for judgment on the pleadings, dismissing the action, and for costs, which, being sustained, plaintiff appeals, and assigns the action of the court in this regard as error.

AFFIRMED.

For appellant there was a brief over the signature of

Messrs. Carson & Fleming, with an oral argument by *Mr. John A. Carson*.

For respondent there was a brief and an oral argument by *Mr. Geo. G. Bingham*.

MR. JUSTICE WOLVERTON, after stating the facts as above reported, delivered the opinion of the court.

If, from the state of the pleadings, it appears that plaintiff is not entitled to any relief against the defendant, it must be admitted that the motion was properly allowed. Plaintiff's title to the premises in controversy depends entirely upon a tax deed, a copy of which is appended to and made a part of the answer. But, in case of failure of title from that source, he claims the right to recover from defendant the amount of taxes standing delinquent against the premises at the date of such sale, and which constitutes the consideration for the deed. The amount is alleged to be \$113.11.

1. It is conceded by the parties that the description of the premises in the notice of sale and deed is correctly copied from the assessment roll for Marion County for the year 1890. The assessor is required, in the preparation of the assessment roll touching landed property, to set down in separate columns, according to the best information he can obtain: "(1) The names of all the taxable persons in his county; (2) a description of each tract or parcel of land to be taxed, specifying under separate heads the township, range, and section in which the land lies, or, if divided into lots and blocks, then the number of the lot and block; (3) the number of acres and parts of an acre, as near as the same can be ascertained, unless the land be divided into blocks and lots; (4) the full cash value of each parcel of land taxed." "If the land assessed be less or other than a

subdivision, according to the United States survey, unless the same be divided into lots and blocks, so that it can be definitely described, it shall be described by giving the boundaries thereof, or in such other manner as to make the description certain": Hill's Code, § 2770, subds. 1, 2, 3, and 4, and § 2773. By § 2823 the sheriff is required to execute to the purchaser "a deed of conveyance reciting or stating a description of the property sold, as described in the assessment roll." All these provisions may be said to be mandatory, and the officers are bound strictly to their observance. It is clear that all land, unless divided into lots and blocks, shall be so designated, either by legal subdivisions or by metes and bounds, as to make the "description certain."

But it is contended that if the land is divided into lots and blocks, then it is sufficient to give the number of the lot and block, whether the property assessed consists of an entire lot or less. If divided into lots and blocks, the acreage may be omitted (Code, § 2770, subd. 3); but, unless it is so divided "that it can be definitely described, it shall be described by giving the boundaries thereof": Code, § 2773. We think the right interpretation of this latter section is that if land is so situated that it cannot be correctly described by legal subdivisions, or by lots and blocks, then it must be described by metes and bounds, or in such other manner as to make the description certain.

The land is described in the assessment roll and the deed as "Salem fraction of lot No. 2, in block No. 49." The property sought to be recovered is an undivided one-half of a part only of said lot, or 22 feet and 7 inches by 165 feet thereof. Does the deed contain such a description as will operate to convey the interest sought to be recovered? The word fraction imports "a fragment; a separate portion; a disconnected part": Century Dictionary. Black,

in his Law Dictionary, defines it as "a fragment or broken part; a portion of a thing less than the whole." The word is used to designate a fragmentary part of a whole, disconnected and distinct within itself, rather than an undivided interest; a several, not a joint, interest. So that, looking to the deed, and finding the premises described as "fraction of lot No. 2," there would be no suggestion that an undivided interest in such lot was intended to be conveyed. But the plaintiff seeks not only to recover an undivided interest, but an undivided interest in a fractional part of the lot, and looks to the deed in support of his title. It cannot be said that the less is included in the greater, as the word "fraction" is an indefinite term, and the idea of an undivided interest is not imparted by its use. The term used is "fraction of lot No. 2," not fractional lot No. 2. The latter would imply a lot of less dimensions than a full lot, but the former is indicative of a part less than the whole. It has been held that the grant of a specific quantity of land, parcel of a larger tract, which fails to locate the quantity so conveyed by a sufficient description, makes the grantee a tenant in common with the grantor: *Schenck v. Evoy*, 24 Cal. 110; *Lawrence v. Ballou*, 37 Cal. 518. A deed, however, which purports to describe a specific tract, giving the number of acres, and calling it a parcel of a larger tract, the calls of which fail to describe the tract intended to be conveyed or other tract, does not operate even to convey an undivided interest: *Grogan v. Vache*, 45 Cal. 610. The deed under consideration does not purport to convey a definite quantity out of a larger tract, neither does it describe any particular parcel of lot No. 2, so that it could not be construed as conveying any interest in such lot, either undivided or several. As it regards ordinary conveyances, the description of the premises sought to be conveyed must be sufficiently definite and certain to enable the land to be identified, otherwise they are void

for uncertainty. With the deed before us, it is impossible to ascertain what was meant to be conveyed. There is an inexplicable uncertainty in the description, amounting to a patent ambiguity, and, measured by the rules which govern in ordinary transfers of title, the deed conveys nothing: 2 Devlin on Deeds, § 1010; *Williams v. Western Union Ry. Co.*, 50 Wis. 71 (5 N. W. 482). It is claimed that greater strictness is required in the description of land to be conveyed by a tax deed than is the case with voluntary deeds. Whether this is so or not, it is clear that it must be described, and with such accuracy that it can be ascertained and identified with ordinary and reasonable certainty: 2 Devlin on Deeds, § 1405. Such is not the case here, and the deed cannot be upheld as a transfer of title. The description is so vague and indefinite that it fails to point out any parcel of land, and it is absolutely impossible, by any rules of construction known to the law, to apply it to the land which plaintiff seeks to recover, nor are the defects such as may be cleared up by parol evidence: See *Johnson v. Ashland Lumber Co.*, 52 Wis. 465 (9 N. W. 464); *Larrabee v. Hodgkins*, 58 Me. 413; *Ronken-dorff v. Taylor*, 29 U. S. (4 Pet.) 349; *Smith v. Blackiston*, 82 Iowa, 242 (47 N. W. 1075); *Brickey v. English*, 129 Ill. 646 (22 N. E. 854); *Wilkins v. Tourtellott*, 28 Kan. 825; *Griffin v. Creppin*, 60 Me. 270; *Roberts v. Deeds*, 57 Iowa, 320 (10 N. W. 740); *Brinson v. Lassiter*, 81 Ga. 40 (6 S. E. 464); *People v. Flint*, 39 Cal. 670; Black on Tax Titles, § 405.

2. There being a failure of title, the question remains, Should the plaintiff recover the amount of taxes paid as the consideration of the deed? It is provided by section 2823, Hill's Code, that "in any action, suit, or proceeding for the recovery of lands sold for taxes, except in cases where the taxes have been paid, or the land redeemed as provided by law, the defendant, or party claiming to be the owner as against the holder of the tax title, must, with

his answer, tender and pay into court the amount of the taxes for the payment of which the lands were sold, together with interest thereon at twenty per centum per annum from the date of the sale to the date of the said tax deed, together with the sheriff's fees for making said certificate and sheriff's deed, and also any taxes the purchaser may have paid on said lands, with interest thereon from the date of payment to the date of filing said answer, for the benefit of the holder of said tax deed, his heirs or assigns, in case said tax title should fail in said action, suit, or proceeding." The proceeding here provided for, or, rather, the remedy established in favor of the purchaser at a tax sale, is supported upon the principle that the purchaser, through the instrumentality of the deed, though irregular and ineffectual to convey title through failure of the proper officers to comply with the statutory regulations touching the assessment of property and collection of taxes, acquires a lien upon the property to the extent of the taxes for the payment of which the land was sold. The sale of real property under the provisions of the assessment laws conveys to the purchaser, subject to redemption, all the estate or interest of the owner: Hill's Code, § 2821. The owner may redeem within two years from the day of sale, by repaying the purchase money with certain interest and costs: Section 2820. But if he does not redeem within that time the sheriff may execute to the purchaser a deed, and thereafter, if the proceedings have been regular and the deed properly executed, the delinquent is without remedy to recover back the property so sold for taxes; but, should the tax title fail, the effect of section 2823 is to permit a redemption notwithstanding the deed. In order to do this, however, he is required to repay the amount of taxes for which the land was sold. In such case the deed of the sheriff conveys to the purchaser the interest of the county in the property, and,

where the title proves defective, a lien is created in favor of the purchaser by indirection, and this by reason of the fact that the delinquent is without remedy except upon the conditions imposed by the statute. There appears to be no direct provision in the statute making taxes a lien upon real property, and it is doubtful whether any such lien exists in this State; but we think the effect of the provisions herein cited is to create a lien in favor of a purchaser from the day of his purchase. That is to say, the county, through the sheriff, transfers to the purchaser its interest in the premises, and, if redemption is had, the purchaser is as much entitled to the amount of the taxes paid, with interest and costs, as the county was entitled to the tax in the first instance. This does no injustice to the taxpayer, for, so long as there is a legitimate tax standing against him, he ought not to be permitted to avoid a tax deed which is without potency to carry the title because of irregularities in the proceedings without first reimbursing the purchaser. So that, if he would relieve himself of the incubus of an insufficient tax deed through the interposition of the courts, he must tender the taxes unless they have been paid or the land redeemed.

But the rule has its limitations, and it is not in every instance where the tax title fails that the land owner is required to tender the taxes paid by the purchaser before he is entitled to recover as against the tax deed. If the tax itself were vicious, or such as the legislature could not lawfully impose upon the person or property, the tender could not be required, as it would result in a lawless exaction, which the state would be without power to compel either directly or indirectly: *Cooley on Taxation*, 551, 552; *Hart v. Henderson*, 17 Mich. 218; *Sinclair v. Learned*, 51 Mich. 335 (16 N. W. 672); *Power v. Larabee*, 3 N. Dak. 55 (49 N. W. 724, 44 Am. St. Rep. 577); *Black on Tax Titles*, § 438; *West v. Cameron*, 39 Kan. 738 (18

Pac. 894). And it seems that where the description is so vague and indefinite as not to be the means of describing any lands, and therefore insufficient for the purposes of assessment, and the deed is without efficacy for the same reason, the county acquires no interest in the land by virtue of the assessment, and hence cannot create or transfer a lien to the purchaser for the taxes for which the land is sold by a deed which is ineffectual in itself to identify such land. The doctrine of caveat emptor applies to such a purchaser, and he acquires nothing, because the county conveys nothing by its deed. The very corpus involved in the transaction is not identified for any purpose. So, it cannot be said that the county, through the instrumentality of the assessment, sale, and deed, has transferred to or created a lien in favor of the purchaser for the taxes paid. The case contemplated by the statute is analogous to the equitable transfer of a mortgage security to the purchaser at a void judicial sale under an invalid foreclosure proceeding, or the subrogation of the purchaser to the rights of the lien holder. But if the lien is void in the first instance, that is to say, if the property is so imperfectly described as to give no lien, the void judicial sale is without potency for the equitable transfer of a lien to the purchaser, because none ever existed, and the proceeding cannot create one. In support of these views see *Roberts v. Deeds*, 57 Iowa, 320 (10 N. W. 740); *Early v. Whittingham*, 43 Iowa, 162; and *Powers v. Larabee*, 3 N. Dak. 55 (49 N. W. 724, 44 Am. St. Rep. 577). In the present case the land was not sufficiently identified for the purpose of assessment, and the county acquired no lien, even if the statute gives one upon the property for taxes levied upon it or otherwise (Black on Tax Titles, §§ 112, 184; *Jefferson v. Whipple*, 71 Mo. 519); and the deed was powerless to transfer such supposed lien to the plaintiff, much less to create one in his favor for the taxes

paid as the purchase price of the premises. Now, it is apparent from what has been said that defendant was not required to tender the amount of the alleged taxes for the payment of which the land was attempted to be sold before he could be permitted to contest the title of plaintiff under his tax deed, hence the issue attempted to be raised by the reply in that regard becomes immaterial. So does the issue raised by a denial of the allegation in the answer to the effect that Ladue paid the taxes for the year 1890, prior to the day of sale. The question then recurs as to whether the deed will support the title which plaintiff alleges that he possesses. We have seen that it will not, hence the motion for judgment on the pleadings was properly allowed.

Other questions are raised by the record touching irregularities in the tax proceedings, sale, and deed, which it is claimed render the tax title void; but, under the view we have taken, they all become immaterial, and for this reason we have refrained from discussing them.

AFFIRMED.

Argued October 19; decided November 9, 1896.

BRIDAL VEIL LUMBERING CO. v. JOHNSON.

(46 Pac. 790; 34 L. R. A. 368.)

1. **RIGHT OF EMINENT DOMAIN.**—The right of eminent domain is one that can be exercised only by legislative authority, and for a use beneficial to the public, and whether a proposed use is a public one is for the courts to determine as a question of fact.
2. **EMINENT DOMAIN—PUBLIC USE.**—A railroad chartered to extend from a certain town past a saw mill, through rough, mountainous, timbered, and sparsely settled country, to the middle of a certain section on lands of the United States, without going near any other town, city, or settlement, or other railroad, and which has been built only a very few miles from the town into the timbered region, and has no freight or passenger depots, passenger coaches, or freight cars, except logging trucks, and has never charged passengers any fare—is a railroad for which eminent domain may be exercised, where it is not shown that it was intended simply as a logging road, and everyone having occasion to use it as a passen-

30	205
32	581
33	587
32	591
30	205
37	374
30	205
44	252
30	205
46	248
30	205
48	483

ger or for the transportation of freight has a right to require the service.*

From Multnomah: HARTWELL HURLEY, Judge.

This is an action by the Bridal Veil Lumbering Co. against D. S. Johnson, to condemn a right of way for a railroad. The defense is that plaintiff was organized for the operation of a saw mill for the manufacture of lumber, and the proposed railroad is intended for its own private use and benefit in connection therewith, and not for the ordinary purposes of a railroad for the transportation of freight and passengers, and that therefore the use for which the land is required by the plaintiff corporation is not public, so as to justify the exercise in its behalf of the power of eminent domain. The cause was tried without the intervention of a jury, and on July 31, 1892, the court filed its findings of fact and conclusions of law, from which it appears that plaintiff was incorporated in 1889; that by its original and supplementary articles of incorporation one of its purposes is that of constructing and operating a railroad for the transportation of freight and passengers from Bridal Veil, Oregon, by way of the mill of the Bridal Veil Falls Lumbering Company, to the center of section 1, Tp. 2 S., of R. 7 E. of the Willamette meridian, near the base of Mount Hood, in the State of Oregon, both its terminal points being in Multnomah county; that it was not organized for the sole purpose of operating a saw mill, or for supplying the mill with saw logs, or for constructing and maintaining a logging road

*NOTE.—With the case of *Pittsburg Railroad Co. v. Benwood Iron Works* (W. Va.), 2 L. R. A. 680, is a note discussing several branches of the question of eminent domain, and particularly the character of the use for which the property is demanded. The matter is discussed in *Wisconsin Water Company v. Winans* (Wis.), 39 Am. St. Rep. 813, and other cases are cited in the note thereto, and the question is considered at length in *Butte Ry. Co. v. Montana Union Ry. Co.* (Mont.), 50 Am. St. Rep. 508, with note.—REPORTER.

thereto; that a portion of the railroad has already been constructed, and so operated and maintained that "the general public have had the use and benefit thereof for the transportation of freight and passengers whenever freight was offered or passengers desired to ride"; and that, "so far as completed, it provides means of transportation useful and beneficial to the people living in the section of country in which it is built," and "gives to them and persons having business in that vicinity improved facilities for the transportation of freight not possessed before." From these findings the court concluded, as a matter of law, that the plaintiff was entitled to exercise the power of eminent domain. A short time after they were filed, the defendant moved for additional findings of fact, and presented a series of proposed findings, some of which the court adopted. From these it appears that the northern terminus of that portion of plaintiff's road as located and constructed is at the saw mill referred to, about two miles from and at an elevation of 1,300 feet above the town of Bridal Veil; that no line or route of the proposed road has ever been surveyed, located or constructed from Bridal Veil to the saw mill; that, as surveyed and constructed, it extends a distance of five and a half miles to lands owned by plaintiff; that the southeastern terminus of the route, as described in the articles of incorporation, is near the base of Mount Hood, upon land owned by the government of the United States, and that there is not at or near thereto any town, city, or settlement, or other railroad; that the country along such route is rough, mountainous, covered with timber, and sparsely settled, and, except the town of Bridal Veil, there is at no place on the line or in its vicinity any town, city, or thickly settled neighborhood; that the plaintiff has connected with its railroad no freight or passenger depots, no passenger coaches, and no freight cars, except

that it has a number of trucks, on one of which there is a platform, covered in time of rain, and that plaintiff has never carried over its road any passengers for hire, but has always permitted any person who wished to ride on its trucks to do so without charge. Among the findings proposed by the defendant, but rejected by the court, is one to the effect that the principal purpose for which that portion of the road already constructed was built, and for which it is and has been used, is that of transporting saw logs from the lands of plaintiff to its mill. A judgment having been entered upon the findings in favor of plaintiff, the defendant appeals.

AFFIRMED.

For appellant there was a brief over the name of *Watson, Beekman & Watson*, with an oral argument by *Mr. Edward B. Watson*.

For respondent there was a brief over the name of *Bronaugh, McArthur, Fenton & Bronaugh*, with an oral argument by *Mr. Lewis L. McArthur*.

MR. JUSTICE BEAN, after stating the case in the foregoing language, delivered the following opinion of the court:

1. There being no bill of exceptions in the record, the only question for our determination is whether the findings of fact support the judgment. The right of eminent domain is a right of sovereignty, and can be exercised only by legislative authority, and for a public use or benefit. When, therefore, a particular corporation claims the right to take private property without the consent of the owner, it must show not only a legislative warrant, but, if its right is challenged on that ground, it must be able to establish the fact that the enterprise in which

it is engaged is one by which a public use or benefit is to be subserved or promoted, so that such taking can be said to be for a public and not a private use. The necessity or expediency of taking private property for public use, the instrumentalities through which it may be done, and the mode of procedure, are legislative and not judicial questions. But, whether the proposed use thereof is in fact public, so as to justify its taking without the consent of the owner, has always been a question for the courts to determine, and, in doing so, they are not confined to the description of the objects and purposes of the corporation as set forth in its articles of incorporation, but may resort to evidence aliunde showing the actual business proposed to be conducted by it: *Lewis on Eminent Domain*, § 158; *Matter of Niagara Falls & Whirlpool R. Co.*, 108 N. Y. 375 (15 N. E. 429); *Chicago & E. I. R. R. Co. v. Wiltse*, 116 Ill. 449 (6 N. E. 49).

2. Now, in this case, from the findings of fact, it clearly appears that plaintiff is a corporation organized for the construction of a railroad for the transportation of freight and passengers, and therefore sections 3239 and 3240, Hill's Code, invest it with authority to exercise the power of eminent domain, if the use it intends to make of the property sought to be taken is in fact public. Bearing upon this question, the findings are that it has already constructed five and a half miles of road, and is now and has been operating the same for the use and benefit of the general public in carrying freight and passengers, and there is nothing in the record anywhere to indicate that the road has ever been used or is intended to be used for any other or different purpose, or that it was built or intended for a logging road, or has ever been used for that purpose; or, in fact, that it is in any way connected with or a part of the mill enterprise; or, indeed, except by inference, that it belongs to the mill company. We are, there-

fore, unable to say that the court was in error in holding that the railroad of plaintiff is public so as to justify the exercise in its behalf of the power of eminent domain. The fact that it has not been fully completed between the termini indicated in its articles of incorporation, or that there is at present no town, city, or settlement, or other railroad at its proposed southeastern terminus, or that its proposed route is through a rough, mountainous, and sparsely settled country, or that the plaintiff has not yet fully equipped the road, or supplied itself with complete and perfect terminal facilities, or that it has not charged the passengers upon its railroad any fare, does not affect its right to exercise the power of eminent domain. The question of public use is not determined, as a matter of law, by any of these things, but by the fact that the proposed road is intended as a highway for the use of the public in the transportation of freight and passengers. And it can make no difference that its use may be limited by circumstances to a small part of the community. Its character is determined by the right of the public to use it, and not by the extent to which that right is exercised: *De Camp v. Hibernia Railroad Co.*, 47 N. J. Law, 43; *Phillips v. Watson*, 73 Iowa, 28 (18 N. W. 659); *Ross v. Davis*, 97 Ind. 79.

If every one having occasion to use the road as a passenger or for transportation of freight may do so, and of right may require the plaintiff to serve him in that respect, it is a public way, although the number actually exercising the right is very small. The findings of the court show that the enterprise in which plaintiff is engaged, and for which it requires the land in question, is of this character, and therefore we have no alternative but to affirm the judgment. In doing so, however, we do not desire to be understood as holding that a railroad constructed by a mill company for the evident purpose of transporting logs to

its mill can become a public highway, so as to justify the exercise of the power of eminent domain in its behalf, because of any declaration in its articles of incorporation to that effect, or on account of any right of the public to use it for the transportation of freight and passengers. No such question is presented by this record. The findings of the court by which we are bound negative such an inference, and this decision is based upon the facts as found by the court below. The judgment must therefore be affirmed.

AFFIRMED.

Argued October 21; decided November 30, 1896.

MUNKERS v. FARMERS' INS. CO.

(46 Pac. 850.)

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230	480

1. **PROOF OF HANDWRITING—COMPARISON WITH GENUINE WRITINGS.**—Under section 765 of Hill's Code, providing that evidence as to handwriting may be given by a comparison by a skilled witness, or by the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, it is competent for a party to use as standards, for the purpose of showing by a comparison of handwriting that a material letter was written by such adverse party, any writings admitted or shown to be genuine, regardless of whether they refer to the matter in issue or not.
2. **EVIDENCE OF CHARACTER* IN FIRE INSURANCE CASES.**—In an action on a fire insurance policy, payment of which is contested on the ground that the fire was set by the insured, evidence as to the general good character of the plaintiff is not admissible, as this is not a case where the issue involves character, under section 842 of Hill's Code.

From Linn: GEORGE H. BURNETT, Judge.

Action by Geo. W. Munkers against the Farmers' & Merchants' Insurance Company of Albany, Oregon, to recover on a fire insurance policy. After a trial before a

*In *Cooper v. Phipps*, 24 Or. 357, it was held that in actions for slander the good character of plaintiff cannot be shown until it has been attacked.—REPORTER.

There was a verdict for plaintiff, and from the judgment entered thereon defendant appeals.

REVERSED.

For appellant there was a brief over the names of Messrs. James K. Weatherford and Starr, Thomas & Chamberlain, with an oral argument by Mr. J. R. Wyatt.

For respondent there was an oral argument by Mr. W. H. Smith.

Opinion by MR. JUSTICE BEAN.

This is an action on a fire insurance policy issued to W. Munkers by the Farmers' & Merchants' Insurance Company of Albany, in this State. As a defense it is, among other things, alleged "That the plaintiff, either by his own hand set fire to the building which contained the property covered by said policy of insurance, or to the property itself, or caused fire to be set thereto through some person unknown to the defendant; and that he willfully, and for the purpose of cheating and defrauding this defendant out of the said sum of \$900, caused the said property to be destroyed by the said alleged fire set forth in plaintiff's complaint." On the trial there was offered and received in evidence a communication addressed to the editor of the Oregonian, purporting to be a statement made by one J. N. Listmon as to the origin of the fire, but which the defendant claims and gave evidence tending to show was written by the plaintiff, and published at his instance, to avert suspicion from himself. For the purpose of showing that this communication was in the handwriting of plaintiff, the defendant offered to use for comparison therewith four certain letters admitted by the plaintiff to be genuine, and to have been written by himself; but the court allowed

only one, which had some reference to the matter in controversy, to be used for that purpose, and this ruling is assigned as one of the errors in the case. No papers not otherwise competent could be introduced in evidence in the courts of England for the mere purpose of enabling a jury or an expert to institute a comparison of handwritings with the document or signature in dispute until 1854, when parliament passed an act expressly authorizing such comparisons to be made: Rogers on Expert Testimony, § 130. In this country there is an irreconcilable conflict in the adjudged cases as to the right to institute a comparison of handwriting placed in juxtaposition, in the absence of a statute allowing such a procedure: 9 Am. & Eng. Enc. Law, 279 et seq.; Lawson on Expert and Opinion Evidence, 375 et seq. But all dispute on this question has been put to rest in this State by section 765, Hill's Code, which provides that "Evidence respecting the handwriting may also be given by a comparison, made by a witness skilled in such matters, or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered." Under this statute it is clear that any writing which is admitted to be or treated as genuine by the party against whom the evidence is offered may be used for the purpose of comparison with the writing or signature in question, although it may not be admissible in evidence for any other purpose: *Holmes v. Goldsmith*, 147 U. S. 150 (13 Sup. Ct. 288); *Peck v. Callaghan*, 95 N. Y. 73; *Baker v. Mygatt*, 14 Iowa, 131. The objection principally urged against such evidence is the embarrassment likely to arise from the multiplication of issues in respect to the genuineness of the writing offered as the standard of comparison. But under our statute no such question can arise, for it provides that such writings only as are admitted to be genuine, or such as the adverse party has so treated, shall be used for that purpose.

2. The next assignment of error is based upon the ruling of the trial court in admitting evidence of the good character of plaintiff for honesty and fair dealing, and as a peaceable and law-abiding citizen. This ruling we think was error. The rule is well settled that evidence of the character of a party is not admissible in civil actions, except in those cases in which the issue involves his character: Hill's Code, § 842*; 1 Greenleaf on Evidence, § 54; 1 Wharton on Evidence, § 47. Now, the character of plaintiff is not involved in the issue in the case under consideration, nor does his recovery depend upon whether it is good or bad. It is true that if the allegation of the answer that he burned the property in question, or caused it to be burned, should be proved, his reputation for honesty would be seriously affected, but so would that of a party against whom a charge of gross fraud, forgery, or deceit should be established in a civil action, and it has never been supposed that evidence of good character would be admissible on that account. It is not every allegation of fraud or wrong doing that involves character, within the meaning of this exception, for if it were so, the defendant's character would be in issue in most of the controversies in the courts of justice. The exception is of a technical nature, and is confined to certain cases from the nature of which character is of particular importance, such as actions for breach of promise, libel and slander, malicious prosecution, criminal conversation, seduction, and the like. In such cases character is directly involved in the issue, as affecting the amount of the damages, and evidence in respect thereto is therefore held admissible. But this action is not of that class. It was

*Section 842 of the Code provides that "evidence of the good character of a party is not admissible in a civil action, suit, or proceeding, unless the issue therein involves his character; nor of a witness in any action, suit, or proceeding, until the character of such witness has been impeached."—REPORTER.

so held in *Stone v. Hawkeye Ins. Co.*, 68 Iowa, 737 (56 Am. Rep. 870, 28 N. W. 47); and *Schmidt v. N. Y. Union Ins. Co.*, 1 Gray, 529, both which are directly in point. They were actions on insurance policies, and the defense in each case was that the plaintiff had himself burned the property, and the court held that proof of his good character was inadmissible, because it was not involved in the issue, and this ruling is supported by the adjudged cases. See 7 Am. & Eng. Enc. Law, 112, for reference to the authorities. It follows, therefore, that the judgment of the court below must be reversed, and a new trial ordered.

REVERSED.

Mr. Justice WOLVERTON, having been of counsel in the court below, did not participate in this decision.

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32	496

Argued October 28; decided December 7, 1896.

OREGON CITY v. MOORE.

(46 Pac. 1017.)

1. ROAD TAXES—SPECIAL LAW—STATE CONSTITUTION, ARTICLE IV, § 23, SUBD. 7 AND 10.—A provision in a special law giving a common council of a city the exclusive control of all funds collected under general laws for the improvement of roads and streets within such corporation is not in conflict with the State constitution, article IV, § 23, subd. 7 and 10, prohibiting special or local laws "for laying, opening, and working on highways and for the election or appointment of supervisors," and "for the assessment and collection of taxes for * * * road purposes": *City of East Portland v. County of Multnomah*, 6 Or. 62, and *Multnomah County v. Sliker*, 10 Or. 65, followed.
2. ROAD TAXES—CODE, § 4085, SUBD. 4.—Under section 4085, subdivision 4, of Hill's Code, as amended (Laws 1893, p. 60), authorizing the county to levy and collect a road tax, and providing that the County Court shall apportion the amount collected among the road districts in the county, having due regard to the amount of taxes collected therein, to the condition of the roads, and the necessity for repairs, and to the amount of travel thereon, a city having the right to control the expenditure of its part of such funds cannot compel the county treasurer to pay the same to it till such apportionment is made.

ON REHEARING.

3. **RIGHT OF CITY TO ROAD TAXES.**—The right of a city to a portion of the road tax collected by county officials from its inhabitants cannot be determined by a mandamus proceeding against the county treasurer, where the law under which the tax was collected gives the County Court the power to determine the share belonging to the municipality, the remedy being by appeal from the award.
4. **RIGHT OF CITY TO SHARE OF ROAD TAX.**—LAWS 1893, PAGE 116.—Sections 6 and 7, of the act of February 21, 1893 (Laws 1893, p. 116), refer only to the collection and custody of taxes collected by county officers as agents of the municipality for which they were levied, and do not authorize a city to maintain mandamus against a county treasurer for a share of the road taxes collected under a general law, in the absence of an order from the County Court fixing the city's proportion of the fund, and ordering the county treasurer to pay it over.

From Clackamas: THOS. A. McBRIDE, Judge.

This is a mandamus proceeding by the municipal corporation of Oregon City to compel the county treasurer of Clackamas County to pay over to the plaintiff certain road taxes collected under the general laws of the State. A demurrer to the alternative writ having been sustained, the petitioner appeals.

AFFIRMED.

For appellant there was a brief over the names of *F. T. Griffith*, City Attorney, and *C. D. & D. C. Latourette*, with an oral argument by *Mr. C. D. Latourette*.

For respondent there was a brief over the names of *W. M. Barrett*, former District Attorney, *L. L. Porter*, Deputy District Attorney; *Brownell & Campbell*, and *F. J. Cleeton*, District Attorney, with an oral argument by *Mr. C. C. Brownell*.

Opinion by MR. JUSTICE BEAN.

The record discloses that in January, 1895, the County Court of Clackamas County levied a tax of four mills on the dollar on all the taxable property within that

county, and a poll tax of \$2 upon each and every person liable therefor, for road purposes, as authorized by subdivision 4 of section 4085, Hill's Code, as amended in 1893 (Laws 1893, p. 60); and that pursuant to such levy there has been collected from the property and inhabitants of Oregon City, and paid over to the defendant, the sum of \$2,874.77, which the plaintiff claims by virtue of subdivision 28, chapter V, of its charter, which reads as follows: "The council shall have exclusive control and direction of all funds collected under general laws for the improvement of roads and streets within said corporation, and the street superintendent shall perform the duties of supervisor as required by the general laws of this State relating to streets and highways; but he shall report to and be under the direction of the city council, and not to the board of county commissioners of Clackamas County; *provided*, that the city council may, by ordinance, direct that any or all of such funds collected for road purposes be expended on any main county road leading into Oregon City, when in their judgment the city would be benefited thereby; *provided*, that the city council shall turn over to the County Court of Clackamas County forty per cent. of the funds so collected each year, and the same shall be expended under the direction of said County Court on main county roads leading into Oregon City."

1. In behalf of the defendant, it is contended that this provision of plaintiff's charter is in conflict with article IV, § 23, subd. 7 and 10, of the State constitution, which inhibits the legislature from passing special or local laws "for laying, opening, and working on highways, and for the election or appointment of supervisors," and "for the assessment and collection of taxes for state, county, township, or road purposes," and is therefore void. But it seems to us that upon this question the case is ruled by *City of East Portland v. County of Mult-*

nomah, 6 Or. 62, in which it was held that a provision in an act incorporating a city, excepting the territory within the limits of the municipality from the jurisdiction of the County Court for road purposes, and vesting the same in the municipality, was not violative of the provisions of the constitution referred to. This case was re-affirmed in *Multnomah County v. Sliker*, 10 Or. 65; and *City of Astoria v. Clatsop County*, not reported. Now, if the legislature may, by a special law incorporating a city, constitutionally vest in the municipality exclusive jurisdiction over the county roads within its boundaries, it seems to us no valid objection can be made on constitutional grounds to a provision in such an act merely conferring upon the municipal authorities the right to control the expenditure of funds applicable to the improvement of roads and streets within the municipality, collected under general laws.

2. But, notwithstanding the constitutionality of plaintiff's charter, the demurrer to the alternative writ was properly sustained because it does not appear from the record that the portion of the taxes collected under the levy of January, 1895, to which plaintiff is entitled, has ever been ascertained or determined by the proper tribunal, or at all. The statute under which it was levied provides: That in any county in this State the County Court of such county, at the time of levying the tax for county purposes, may, if in the judgment of the County Court it is for the best interests of the county, levy a tax upon all the taxable property in the county, not to exceed five mills on the dollar, and in addition thereto a poll tax of \$2 be assessed upon every person who shall be liable to pay a state poll tax, which taxes shall be collected with and at the same time and in the same manner as county taxes shall be collected, and shall be paid into the county treasury, and shall be kept as a separate fund to be known

as the road fund, and shall be used for the purpose of laying out, opening, making, and repairing county roads, and building and repairing bridges; and no other tax or other taxes for the purpose in this section mentioned shall be levied or collected, except that the County Court may order bridges built or repaired out of the general fund. Such County Court shall apportion the taxes so collected among the several road districts in the county, having due regard to the amount of taxes collected in the several road districts, to the condition of the roads, and necessity for repairs, and to the amount of travel thereon. The county clerk shall thereupon notify the road supervisor in each of the road districts in his county of the amount of the road fund set apart for the use of his road district, for opening, making, and repairing county roads, and building bridges in his road district; and such supervisor shall direct and supervise the expenditure of such amount of the road fund so set apart for the purpose herein named, and certify his accounts for labor performed or material furnished to the County Court; and if the County Court approves the same, it shall order warrants on the county treasurer in favor of the person performing such labor or furnishing such material, payable out of the fund to the credit of such road district, and until such fund is exhausted": Laws 1893, p. 60. Under the general law, the County Court is invested with jurisdiction to divide the county into road districts, and, by the statute in question, to levy and collect a special tax for road purposes, and apportion the same among the several road districts of the county in the manner therein provided, and, through supervisors appointed by it, to control and direct the expenditure of the amount set apart for each road district. This jurisdiction extends to all parts of the county, including the territory of Oregon City, except as it may be limited and qualified by the city charter. And

the only limitation to be found in the charter is that the municipal and not the county authorities shall "have the control and direction of all funds collected under the general laws for the improvement of roads and streets within said corporation," and the right to appoint the road supervisor. In all other respects the jurisdiction of the County Court over the territory of Oregon City remains unimpaired. It may divide it into road districts, levy and collect from the inhabitants thereof, and the property therein, in connection with the remainder of the county, a road tax, ascertain and determine the amount thereof, which shall be apportioned to and expended in the road district or districts within the limits of the municipality, but when the apportionment is made its jurisdiction ceases so far as the expenditure of the amount set apart for the district or districts within Oregon City is concerned, and that of the municipality begins. Until such apportionment, there can be no fund arising out of the tax "for the improvement of roads and streets" within Oregon City or in any other district of the county. The statute does not require the tax to be expended in repairing the roads and highways in the district from which it is collected, but it becomes a common road fund to be apportioned by the County Court among the several districts of the county, having due regard to the amount of tax collected from each district, the condition of the roads, and the amount of travel thereon. This apportionment is a judicial act, and until it is made the county treasurer certainly cannot be compelled by mandamus to pay over any part of the fund to the plaintiff. No such proceeding seems to have been had, and therefore the judgment must be affirmed, and it is so ordered.

AFFIRMED.

Decided February 23, 1897.

ON REHEARING.

Opinion by MR. JUSTICE BEAN.

3. However willing we might be to accommodate counsel, the question as to what portion of the road taxes collected from the property and inhabitants of Oregon City shall be under the exclusive control and direction of the municipality cannot be determined in a mandamus proceeding against the county treasurer. The law under which the tax was levied and collected makes the County Court the tribunal to determine that question in the first instance, and it is only on an appeal regularly brought to this court that we can review its decision.

4. Nor do sections 6 and 7 of the act of February 21, 1893 (Laws 1893, p. 116) have any application to this case. These sections have reference only to the collection and custody of taxes collected by the county officers for the district or municipality for which they were levied. The fund in question here, however, was levied and collected by the county under the general law, and the defendant holds it as the agent and officer of the county, and cannot be compelled to pay any portion of it over to the city without an order from the County Court authorizing him to do so. A writ of mandamus can issue only to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station (Code, § 593), and without an order of the County Court determining what portion of the road taxes collected shall be apportioned to the road districts within Oregon City, it is clear the law does not specially enjoin upon the defendant the payment of any portion thereof to the municipality as a duty resulting from his office.

REHEARING DENIED.

Argued October 29; decided December 7, 1896.

BOOTH v. MOODY.

(46 Pac. 884.)

BROKER'S COMMISSIONS*—AIDED BY VERDICT.—To entitle a real estate broker to commissions it must be shown that the broker produced to the seller some one who bought the property, or a purchaser who was ready, able, and willing to buy on the terms proposed, and that such purchaser was rejected (*Fisk v. Henarie*, 13 Or. 156; *Kyle v. Rippey*, 20 Or. 446, followed); and a failure to plead such facts leaves the complaint so defective that a verdict will not cure it, for the complaint will not then contain allegations under which these matters can be proved: *Houghton v. Beck*, 9 Or. 325; *David v. Waters*, 11 Or. 448; *Weiner v. Lee Shing*, 12 Or. 276; and *Bingham v. Kern*, 18 Or. at page 201, approved and followed.

From Marion: GEO. H. BURNETT, Judge.

Action by J. C. Booth against Z. F. Moody to recover commissions for procuring a purchaser of certain lands belonging to defendant. There was a judgment for the plaintiff, and defendant appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Messrs. Ralph E. Moody and Wm. H. Holmes*.

For respondent there was a brief and an oral argument by *Messrs. John A. Carson and Tilmon Ford*.

Opinion by MR. JUSTICE BEAN.

This is an appeal from a judgment rendered in favor of the plaintiff in an action brought by him to recover

*NOTE.—Appended to the case of *Ward v. Cobb*, 12 Am. St. Rep. 589, is a collection of recent cases showing when a real estate broker becomes entitled to his commissions. The same question is discussed in a note to *Kalley v. Baker*, 28 Am. St. Rep. 547; and further authorities may be found in 48 Am. St. Rep. 620 (*Mullaney v. Greenhood*).—REPORTER.

commissions as a real estate broker. The principal question presented is the sufficiency of the complaint, and is raised in this court for the first time. Omitting formal parts, it is as follows:

"1. That at all the days and times hereinafter mentioned the plaintiff was and for a long time prior thereto has been and now is a real estate agent and broker, carrying on business as such agent and broker in the City of Salem, Marion County, Oregon. 2. That at the City of Salem, in Marion County, Oregon, in or about the month of May, 1895, the defendant employed the plaintiff, as such broker and agent, to find, obtain, procure, and produce a purchaser for the defendant's farm of sixty acres near Salem aforesaid. and the defendant agreed to pay the plaintiff for his said services the customary commission or fee of five per cent. upon the selling price of said land. 3. That immediately thereafter the plaintiff entered upon the performance of his duties under said contract with said defendant, and continued to perform his said duties thereunder, to find, obtain, procure, and produce such purchaser, and so continued his said services until the month of January, 1893, when the plaintiff found, obtained, procured, and produced W. G. Westacott and W. J. Irwin, co-partners doing business under the firm name and style of Westacott & Irwin, at Salem, aforesaid, as purchasers for the defendant's said farm at and for the agreed price or sum of \$6,000. 4. That the plaintiff's said commission on said sum of \$6,000 at said rate of five per cent. amounts to the sum of \$300, and the plaintiff's said services are reasonably worth the said last mentioned sum. 5. That all times have elapsed, and all acts have been done, and all things happened, under the said contract of agency, to entitle the plaintiff to his said commission of \$300, but said defendant has not paid the same nor any part thereof."

Defendant's counsel contend that the complaint is defective because it does not aver either that the land was sold to the parties produced as purchasers by the plaintiff, or that such parties were ready, able, and willing to purchase at the price fixed by the defendant, and that he refused to consummate the sale. In this position they are abundantly supported by authority. The rule unquestionably is that before a real estate broker can recover his commissions he must allege and prove either that he was the procuring cause of an actual sale, or that he produced a purchaser, ready, able, and willing to purchase upon the terms named by the vendor: *Fisk v. Henarie*, 13 Or. 156 (9 Pac. 322); *Kyle v. Rippey*, 20 Or. 446 (26 Pac. 308); *Penter v. Staight*, 1 Wash. 365 (25 Pac. 469); *Jacobs v. Shenon*, 2 Idaho, 1002 (29 Pac. 44); *Fraser v. Wyckoff*, 63 N. Y. 445; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378 (22 Am. Rep. 441); *Sayre v. Wilson*, 86 Ala. 151 (5 South, 157); *Hayden v. Grillo*, 26 Mo. App. 289. The complaint before us does not comply with this rule. There is no allegation therein that the land was actually sold by the defendant to a purchaser produced by the plaintiff, or, indeed, that it was sold at all. Upon this matter the complaint is silent. It simply alleges that plaintiff procured Messrs. Westacott & Irwin as purchasers at and for the agreed price of \$6,000, but does not aver that the land was sold to them, or that the sum named was the price fixed therefor by the defendant, or that he ever agreed to sell for that sum, or that the parties produced by the plaintiff as purchasers were ready, able, and willing to purchase the land at a price fixed by the defendant. In the absence of an allegation either that the land was actually sold, or that the purchaser was ready, able, and willing to purchase on the terms of the vendor, the complaint is manifestly insufficient, and the judgment will have to be reversed, unless the defect is cured by the verdict.

Now, a verdict will cure formal defects in a pleading, such as imperfect statement or the omission of formal allegations, and establishes every reasonable inference that can be drawn from the facts stated, but it will not supply a total omission to state some fact essential to the cause of action. In short, a verdict will aid a defective statement of a cause of action, but will not cure the omission of a material allegation: *David v. Waters*, 11 Or. 448 (5 Pac. 748); *Weiner v. Lee Shing*, 12 Or. 276 (7 Pac. 11); *Bingham v. Kern*, 18 Or. 199 (23 Pac. 182). It is often difficult to distinguish between a defective statement in a pleading which a verdict will cure, and a failure to state a cause of action not so cured. The extent and principle of the rule of aid by verdict is that whenever the complaint contains terms sufficiently general to comprehend a matter so essential and necessary to be proved that, had it not been given in evidence, the jury could not have found the verdict, the want of a statement of such matter in express terms will be cured by the verdict, because evidence of the fact would be the same whether the allegation of the complaint is complete or imperfect. But if a material allegation going to the gist of the action is wholly omitted, it cannot be presumed that any evidence in reference to it was offered or allowed on the trial, and hence the pleading is not aided by the verdict. The rule in such cases, as laid down by Mr. Proffatt in his work on Jury Trials, and which seems to have been adopted by this court in *Houghton v. Beck*, 9 Or. 325, is that "a defect in pleading, whether of substance or form, which would have been fatal on demurrer, is cured by verdict, if the issue joined be such as necessarily required on the trial proof of the facts defectively stated or omitted, without which it is not to be presumed that either the judge would direct the jury to give, or that the jury would have given, the verdict": Proffatt on Jury Trials, § 419. Applying

these principles to the case at hand, we are of the opinion that the defect in the complaint was not cured by the verdict, because it does not contain terms sufficiently general to include the matter omitted, and the issue joined was not such as required the proof thereof on the trial. In other words, the allegations of the complaint could have all been proved without proving the facts omitted, and this is the test laid down by Mr. Justice THAYER in *David v. Waters*, 11 Or. 448 (5 Pac. 748).

It follows that the judgment must be reversed, and it is so ordered.

REVERSED.

Argued November 5; decided December 21, 1896.

RYAN v. RYAN.

(47 Pac. 101.)

DIVORCE—CRUELTY—EVIDENCE.—A divorce for cruel and inhuman treatment, and personal indignities rendering life burdensome, should be granted on evidence that defendant was frequently intoxicated, and was quarrelsome and violent; that at one time he kicked out a door panel; that at another, while violently cursing his wife, he shot off a pistol several times; and that he was in the habit, without provocation, of using vile and offensive language in her presence.*

From Multnomah: E. D. SHATTUCK, Judge.

Suit by Elizabeth Ryan against A. G. Ryan for divorce, which was granted, and the defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Gearin, Silvestone, Murphy & Brodie*, and *Dolph, Mallory & Simon*, with an oral argument by *Messrs. John M. Gearin and Daniel R. Murphy*.

*With the case of *Doolittle v. Doolittle*, 6 L. R. A. 187, is a note citing and classifying many cases on the subject of Cruelty as a Ground for Divorce.—REPORTER.

For respondent there was a brief and an oral argument by *Messrs. Julius C. Moreland and Richard W. Montague.*

PER CURIAM. This is a suit for divorce, based upon two grounds, viz., habitual gross drunkenness contracted since marriage, and cruelty and personal indignities rendering life burdensome. The court below found in favor of plaintiff upon both. We have examined the testimony with much care and attention, and have come to the conclusion the divorce should be granted, While it is thought the charge of habitual gross drunkenness has not been sustained, yet there can be no question but that the defendant has been beastly intoxicated at frequent intervals during late years, perhaps not elsewhere than at his home, and while in that condition was wantonly abusive of plaintiff, treated her harshly and cruelly, and in utter disregard of conjugal fellowship. But it is claimed that the acts charged and proven do not constitute cruel and inhuman treatment, or "personal indignities rendering life burdensome," within the meaning of the statute. Personal violence against plaintiff may not have been directly threatened or imminent, yet she was not without reason for apprehending it. It was shown that the defendant, while intoxicated, was quarrelsome and at times violent, and acted without reason and in utter disregard of consequences. At one time, he kicked out the door panel; at another, while violently cursing her, shot off his pistol a number of times; and at another he followed her around while she was doing her housework, clapping his fist in his hand and swearing that she did not have a relation that could stand up against him. During these and other times, without cause or provocation, he called her "a whore," and applied to her other offensive and opprobrious epithets, and used towards her language so vile and indecent that we refrain from repeating it here. She says his demeanor rendered her nervous and sick, and that she could not live with

him longer. We think that such treatment as is delineated in the evidence, considered in its entirety, is quite sufficient to make the plaintiff apprehensive of her personal safety, and is of a nature calculated to affect her mind, undermine her health, and thereby endanger her life, and hence is sufficient upon which to found a divorce: *Doolittle v. Doolittle*, 78 Iowa, 792 (43 N. W. 616, 6 L. R. A. 187); and *Day v. Day*, 84 Iowa, 221 (50 N. W. 979). There was no condonation, and the decree of the court below is therefore affirmed.

AFFIRMED.

BARGER v. TAYLOR.

(42 Pac. 615; 47 Pac. 618.)

1. **USURY—ADVERSE PARTY TO APPEAL—SERVICE OF NOTICE—CODE, § 537.**—The word "party," as used in section 537 of Hill's Code, providing that a notice of appeal must be served on every "adverse party," means only one who becomes identified with the case in some mode recognized by law, so as to be bound by the proceeding. Within the scope of this rule, the fact that a contract has been adjudged usurious, and the principal declared forfeited to the state for the use of the school fund, does not make the state a "party" to the proceeding so as to require notice of appeal to be served on it.
2. **ADVERSE PARTY TO AN APPEAL—USURY—CODE, § 3589.**—The state is not an "adverse party" in the sense that it must be served with a notice of appeal from a judgment or decree in its favor upon consideration of a contract found to be usurious. It is not obliged to intervene in order to obtain the benefit of the forfeiture provided by section 3589, in cases of usury, and unless it has been made a party to the proceeding in some appropriate manner, it is not a "party" to the litigation at all.
3. **TESTIMONY TO ESTABLISH USURY.**—Forfeitures, though not favored, are firmly upheld as a penalty to the state for a violation of law, but, proof of the transaction incurring such punishment must not be left to probability or conjecture: *Poppleton v. Nelson*, 12 Or. 349, cited and approved.
4. **PRESUMPTION AS TO SCOPE OF AGENCY.**—The presumption is that an agency comprehends the doing of only lawful things, and the law will always assume that an illegal act, as, for example, accepting usury, was done without the principal's authority or consent.
5. **PROOF OF USURY—CODE, § 3589.**—In order to establish usury it must be shown that the borrower paid for the loan, either directly or indirectly, a sum more than the amount of interest at the law-

ful rate, and that the lender either received some part of this excess, or authorized or ratified its exaction.

From Wasco: W. L. BRADSHAW, Judge.

Suit in equity by John Barger against O. D. Taylor and wife to foreclose two mortgages, securing certain notes. There was a decree allowing a small recovery on one note, and declaring the principal of the second note forfeited for usury, under the terms of section 3589 of Hill's Code, from which plaintiff appealed.

REVERSED.

For appellant there was a brief over the name of *Dufur & Menefee*, with an oral argument by *Mr. E. B. Dufur*.

For respondent there was a brief and an oral argument by *Mr. Alfred S. Bennett*.

Argued November 4; decided December 2, 1895.

ON MOTION TO DISMISS APPEAL.

PER CURIAM. I. This is a suit to foreclose a mortgage. The defense is usury. The court below found the contract to be usurious, and rendered a decree for the amount of the original sum loaned against the defendant in favor of the state for the use of the common school fund, as provided in section 3589 of Hill's Code. From this decree the plaintiff appealed, but did not serve the state with notice thereof. The defendant now moves to dismiss the appeal upon the ground that the state is an "adverse party," and should have been served with notice. Under the decisions of this court, if it could be made to appear that the state is a "party" to the decree appealed from in the sense contemplated by the statute regulating appeals (Hill's Code, § 537), its interest being adverse to

that of appellant, the failure to serve it with notice would be fatal to this appeal. But in our opinion the state cannot, under the circumstances of this case, be deemed a "party" within the meaning of that statute. As used therein, the term "party" must be understood in the ordinary legal sense, and to embrace such persons only as become parties to the case in some mode prescribed or recognized by law, so as to be bound by the proceeding. Now, the state never was made a party to this suit, nor did it become or seek to become such. It never appeared in any way, had no right to adduce testimony, cross examine witnesses, or appeal from the decree had it been to the effect that the contract sued upon was not usurious. The statute in relation to usury requires the court to declare the forfeiture and enter the judgment whenever the contract in suit appears to be usurious: Code, § 3589. The forfeiture is to be declared by the court on its own motion, as the result of the litigation between the parties and by force of the statute. Whenever, in any action or suit on a contract, it is ascertained that the contract is usurious, the law steps in, and, *propria vigore*, forfeits the original sum to the common school fund of the county. The entry of the judgment or decree in favor of the state is but the means of carrying out the forfeiture, and does not make it a "party" to the proceeding in the sense that it must be served with notice, or that it is entitled to notice. The question of usury is to be determined upon the issues made and evidence offered by the parties to the litigation. By the terms of the statute the principal sum is to be deemed forfeited, and a judgment in favor of the state is to be rendered, whenever "it shall be ascertained in any suit brought on" a contract that it is usurious, but it cannot be judicially so ascertained until the final determination of the suit. So long as the parties

have a right to continue the litigation, either in the court of original jurisdiction or on appeal, the usurious nature of the contract remains undetermined, and the state is not entitled to judgment. When the suit is fully tried out, if it then appears that the contract is tainted with usury, it is the duty of the court to render a judgment in favor of the state; but, until that time arrives, the state has no interest in the proceeding, and is not entitled to be heard or to be served with notice, unless it has in some way become a party in the manner recognized by law. The state, therefore, bearing no such relation to the case, is not, in our opinion, an "adverse party" within the meaning of the statute providing for the manner of taking and perfecting appeals. It follows that the motion to dismiss must be overruled.

MOTION OVERRULED.

Argued November 9, 1896; decided January 18, 1897; rehearing denied.

ON THE MERITS.

Opinion by MR. JUSTICE WOLVERTON.

Plaintiff seeks the foreclosure of two certain mortgages by separate causes of suit. The defendant interposed a plea of payments not credited as a partial defense to the first cause, and usury as to the second. The court below sustained the defendant's contention, and its decree is for plaintiff upon the first for a small balance due, and in favor of the state and against the defendants upon the second. Plaintiff appeals from the whole decree, but without making the state a party, or serving it with notice, and defendants challenge the regularity of such appeal by a motion to dismiss. The main case presents largely questions of fact. The motion to dismiss was considered, and an opinion rendered touching it some

time ago, and as to that phase of the case the present consideration is upon a rehearing, but not so as it respects the merits.

2. On the former hearing it was held that the state was not an "adverse party" in the sense that requires it to be served with a notice of appeal from a judgment in its favor made and entered upon an usurious contract. We are now constrained to adhere to that opinion, after a careful re-examination of the reasoning upon which it is based. It would seem that the state is not required to intervene in the first instance, and thereby become a party to the suit or action as a condition to the rendition of judgment in its favor. Section 3589 of Hill's Code provides that "If it shall be ascertained in any suit brought on any contract that a rate of interest has been contracted for greater than is authorized * * * the court in which such suit is prosecuted shall render judgment for the amount of the original sum loaned or the debt contracted, without interest, against the defendant and in favor of the State of Oregon for the use of the common school fund of said county, and against the plaintiff for the costs of suit, whether such suit be contested or not." The judgment is the sequence of a litigation entirely between other parties, and is dependent upon the nature of the contract sued upon. The defendant may plead the usury, and pray a forfeiture, and the state bides the result of the contest, or the court may, without contest, if usury appears, forfeit the sum loaned or the debt contracted; so that, in so far as the state is concerned, its interests are fully conserved without its becoming a party to the litigation, and it is in no sense a necessary, indispensable, or adverse party. Now, if prior to the rendition of judgment in its favor it is not a party in that sense, it is difficult to see how the judgment alone makes it such a party for the purposes of subsequent contest in the same litiga-

tion. This is a court of review, and its functions are to revise the proceedings of the lower courts, and it is sufficient that we be placed in like position as regards parties as they were, in order that we may correct, if need be, their judgments and decrees. So that it would seem, if the state is not a necessary nor adversary party below, neither is it here for the purposes of the appeal, which is but a continuation of the litigation instituted and tried out in that court. Its interests will be as well conserved here without its formal presence as there. It was stated, *arguendo*, that so soon as the judgment is entered, the state would have the right to have an execution issue, and that, unless it is notified of an appeal, it could never know when the case had gone to a higher court, and hence might use the execution as though the judgment in the lower court were final. This result could hardly follow. As the state is dependent for its judgment upon the result of a litigation between other parties, it is believed it would be dependent for its execution upon whether the judgment has been suspended by an appeal taken by one or more of such parties, and that it could only have an execution under like conditions as one of the parties to the action; that is to say, it must abide the course of the litigation, and take notice of its condition at all times, as it is entirely dependent for its rights upon the final judgment. But, however this may be, the question here is whether this court can obtain jurisdiction of the cause without the state being served with the notice, and this depends upon the question whether it is a party to the action, or becomes such by the entry of a judgment in its favor. For reasons already stated in this and the former opinion we think it is not a party in the sense that requires it to be served with a notice of appeal, and hence this court may acquire jurisdiction to hear the cause without such service.

We come now to the merits, and the remaining questions are mainly of fact. As it pertains to the first cause of suit, the issue is direct whether defendant should have some additional credits not accorded him by plaintiff. We think his claim to these credits is not supported by the testimony, and they should not be allowed. The amount due plaintiff upon the note for \$1,277, set out in his first cause of suit, is \$400, with interest at ten per cent. per annum from October 12, 1893.

The question arising upon the second cause is whether the note of \$1,000 sued on is tainted with usury. The testimony directly bearing upon the transaction is meager. The note is made payable to "Geo. W. Rowland, Agent," and the mortgage executed to secure its payment is to "Geo. W. Rowland, Agt. of." The money loaned belonged to one C. W. Deitzel, who drew his check on French & Co., bankers, for the full amount of \$1,000 in favor of Rowland. This check is indorsed by Rowland, showing that he received the money. Deitzel testified that the note was delivered to him soon after its execution, and should have been endorsed by Rowland, but by an oversight was omitted until he had traded it to Barger, the plaintiff herein, when it was endorsed as follows: "Pay to John Barger, without recourse, Geo. W. Rowland." This tends to show that Rowland was the agent of Deitzel in making the loan. The latter evidently knew the loan was about to be consummated, as he consulted the defendant about the security. As touching the transaction, the defendant testifies as follows: "Q. What was the real consideration that you received for the execution of the \$1,000 note sued on in this proceeding? A. It was \$950 less some expenses of a mortgage, or recording, or something of that kind. Q. Was that all the money you received for the execution of the note? A. Yes, sir." This is, in effect and substance, all the tes-

timony having direct relation to the contract or understanding of the parties touching the loan. There is some other testimony tending to show that defendant had on previous occasions borrowed money from Deitzel; that he at times exacted bonuses or sums of money from him in excess of the lawful rate of interest; that at one time the defendant was acting as the agent of Deitzel in loaning his money, and that it was his custom to exact a bonus from the borrower and divide it with Deitzel. But these negotiations involved transactions other than the obligation sued on here.

3. By statutory intentment, a contract is to be deemed usurious when an unlawful rate of interest has been contracted for, either directly or indirectly, or when any gift or donation of money or property or other valuable thing has been made to the lender or creditor, or any person for him, either directly or indirectly, either by the borrower or debtor, or any person for him, the design of which is to obtain for money loaned, or for debts due or to become due, a greater rate of interest than is allowed by law: Section 3589, Hill's Code. The enactment is explicit and comprehensive, and was intended no doubt to cover every scheme or device by which the lender may obtain for money loaned or for debts due or to become due more than the lawful rate of interest, and ought to be enforced whenever a case is brought within the compass of its provisions. It is penal in its nature, and works a forfeiture of the original sum loaned. However much the law may abhor a forfeiture where it results in a benefit solely to an individual, it is upheld and sustained as a penalty to the state for the infraction of law, but proof of the transaction which involves and incurs the penalty should be clear and satisfactory, and its establishment should not be left to vague inference or mere probabilities or conjecture. It has been so held in this state in a case

wherein it was sought to establish usury under the present enactment: *Poppleton v. Nelson*, 12 Or. 349 (7 Pac. 492). It may be taken as established that Rowland retained \$50 of the \$1,000 for which the defendant executed his note, and that defendant obtained only \$950 therefor. Further than this, it does not appear for what purpose Rowland was permitted to withhold the sum named, whether as compensation for his services in procuring the loan in the capacity of a broker, or as agent for Deitzel, or whether Deitzel was to receive the money so retained by Rowland, or any part thereof. It is not clear, nor can it be satisfactorily inferred, because Deitzel had on prior occasions made usurious loans, or that the defendant had at one time acted as his agent in consummating such loans, that this money or any part of it was paid to him by Rowland. It is but a conjecture to say that it was retained for his benefit, and there is no cogent or convincing testimony of the fact that it was so retained.

4. But even if it be conceded that Rowland was the agent of Deitzel, we can only assume, without proof to the contrary, that the agency comprehended the doing of a lawful business, and the consummation of lawful transactions; and, as it respects a business or transaction which operates as an infraction of law, the law will presume that the principal did not direct nor assent thereto, and that such transaction was without the scope of the agent's authority given or conferred. The principle is applied to alleged usurious transactions consummated by an agent. In *Gokey v. Knapp*, 44 Iowa, 35, it is said: "An authority to loan money at a legal rate of interest does not include by implication the authority to loan it at an illegal rate. An authority to violate the law will never be presumed." This language is quoted with approval in *Call v. Palmer*, 116 U. S. 102 (6 Sup. Ct. 301). It is said in

Van Wyck v. Watters, 81 N. Y. 352: "The fact that an agent, intrusted with money of his principal to invest, exacts a bonus for himself, without the knowledge or assent of his principal, as a condition to making a loan, does not establish usury. The principal is not liable for such an unauthorized act of the agent, in the absence of proof that he received a portion of the bonus, or in some form reaped a benefit or advantage from the same." So it is held in *Cox v. Life Ins. Co.*, 113 Ill. 385: "The fact that an agent, without the authority, consent, or knowledge of his principal, upon loaning the money of the latter, exacts from the borrower a sum in excess of lawful interest, does not make the loan usurious." The doctrine is maintained by many authorities, and we are constrained to adopt it in the present case. See *Estevez v. Purdy*, 66 N. Y. 446; *Phillips v. McKellar*, 92 N. Y. 34; *Ammerman v. Ross*, 84 Iowa, 359 (51 N. W. 6); *Vahlberg v. Keaton*, 51 Ark. 534 (4 L. R. A. 462, 14 Am. St. Rep. 73, 11 S. W. 878); *Bell v. Day*, 32 N. Y. 165; *Condit v. Baldwin*, 21 N. Y. 219 (78 Am. Dec. 137); *Nichols v. Osborn*, 41 N. J. Eq. 92 (3 Atl. 155); *Brigham v. Myers*, 51 Iowa, 397 (33 Am. Rep. 140, 1 N. W. 613); *Rogers v. Buckingham*, 33 Conn. 81.

5. It would follow from these authorities that it was not only necessary for the defendant to show that Rowland was the agent of Deitzel, and as such took and received from him the \$50 as a consideration for making or causing to be made the loan in question, but that the act was authorized by Deitzel, or was done with his knowledge or assent, or was in some manner ratified by him. See *Greenfield v. Monaghan*, 85 Iowa, 211 (52 N. W. 193), a case much in point. In this latter respect the proof utterly fails, and so we conclude the plea of usury is not sustained, and the plaintiff is entitled to recover upon the second cause of suit the sum of \$1,000, with ten per

cent. interest from the date of the note. He is also entitled, under the pleadings and evidence, to an attorney's fee of \$140. Let a decree be entered for plaintiff in accordance with this opinion, and for the costs of suit.

REVERSED.

Argued November 2; decided December 21, 1896.

SAYRE v. MOHNEY.

(47 Pac. 197.)

ESTATE CONVEYED BY AN AGREEMENT TO SELL REAL PROPERTY.—

At law, a bond for a deed, being in effect and operation a contract for the sale of land, conveys no estate whatever, and such rights as the obligees in such an instrument may thereby acquire are transferable without the formalities of a deed. In equity, however, a bond for a deed is held to transfer the equitable estate, leaving the legal title in the grantor as a security for the payment of the purchase money: *Burkhart v. Howard*, 14 Or. 38, cited.

PROMISSORY NOTE—PROMISE TO CONVEY AS A CONSIDERATION.—

Where the consideration for a note is an agreement by the payee to perform a certain act, as, to execute to the maker of the note a fee-simple title to certain lands, the courts regard the payment and the conveyance as so far dependent that the failure to make the required transfer is a good defense to an action on the note: *Frink v. Thomas*, 20 Or. 265, cited and approved.

From Marion: GEO. H. BURNETT, Judge.

Action on a promissory note. The court struck out certain allegations of the answer and then sustained a demurrer to the new matter remaining. Judgment having been entered for plaintiff, the defendants appeal.

REVERSED.

For appellants there was a brief and an oral argument by *Messrs. H. J. Bigger* and *Geo. G. Bingham*.

For respondent there was a brief and an oral argument by *Messrs. Wm. M. Kaiser* and *John A. Carson*.

Opinion by MR. CHIEF JUSTICE MOORE.

This is an action by Ruth E. Sayre against W. D. Mohney, F. J. Strayer, M. W. Smith, and J. A. Rinehardt to recover the balance due on a promissory note for \$1,724.25, executed September 16, 1892, by the defendants and one L. M. Hensel to the plaintiff, and payable on or before two years from that date, with interest thereon at the rate of ten per cent. per annum, payable annually. The summons being served upon Mohney and Smith only, they alone appeared in the action, and, after denying the material allegations of the complaint, which are in the usual form, alleged that said note was executed as evidence of the purchase price of a tract of land and right of way to and from the same in Marion County, which the plaintiff, by her bond, agreed to sell and convey by warranty deed to the makers of said note, as partners, upon the payment thereof; that soon after its execution they paid her thereon \$804.65, whereupon she permitted them, as partners, to enter into possession of said premises, which they occupied and improved, and on September 16, 1893, paid her the interest then due, amounting to \$91.96; that Hensel, Strayer, and Rinehardt, having assigned their respective interests in said property to them prior to the maturity of the note, of which fact plaintiff had due notice, they, on September 18, 1894, tendered plaintiff \$1,011.60, the balance due on said note, and demanded of her a conveyance of the premises and right of way according to the terms and conditions of the contract, and she thereupon tendered a pretended deed therefor, but at that time and at the maturity of the note the premises were subject to a mortgage to secure the sum of \$2,700, and a delinquent tax of \$19.04 for 1893, and that a part of said premises was in the possession of one Whelon, whom they allege, on information and belief, was the owner thereof; that in consequence of these liens upon and failure of title to the premises they, on Septem-

return and cancel said con-
 and then abandoned the prop-
 session thereof to the plain-
 the notice, rescinded the con-
 been ready and willing to per-
 agreement, but the plaintiff had
 refused to perform her part thereof,
 which they had been damaged in the
 note, and also in the sum of \$375 on
 ements made upon the premises, for
 judgment. A copy of the bond having
 of the answer, from which it appeared
 agreed to convey the premises and right
 defendants as tenants in common, the court,
 struck out the allegations of possession and
 purchase as partners, and sustained a general
 the allegations of new matter contained in
 The defendants refusing to plead further, a
 resulting in a verdict and judgment against
 the amount demanded, from which they appeal.
 contended by counsel for the defendants that
 the contract entered into by the parties was executory
 and the agreement to pay the purchase price evi-
 by the note depended upon the execution of a
 sufficient warranty deed conveying a fee simple
 unencumbered title to the premises; and that, these
 conditions being mutual, the failure of consideration and
 rescission of the contract were rightfully pleaded as a
 defense to an action on the note, and hence the court
 agreed in sustaining the demurrer; while counsel for the
 plaintiff maintain that, the bond for a deed having con-
 veyed an equitable estate in the premises to five persons,
 neither of the obligees could assign his interest, except
 by deed duly executed; that, there being no allegation
 of such a conveyance having been made, Mohny and

30	228
30	265
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35	141
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39	310
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44	100
30	228
48	120

Smith were powerless to rescind the contract; that the surrender of the premises did not reinvest the plaintiff with the title; and that, the defendants having alleged that plaintiff tendered a deed, the answer should have stated that they at that time made known to her their objections to the title, but failed to do so, and for these reasons the demurrer was properly sustained.

When there is a total failure of the consideration of the note upon which the action is instituted the defendant may rescind the contract, as a matter of right: 1 Daniel on Negotiable Instruments, 203. But it has been held that failure of title to real estate purchased by the defendant will not be a sufficient defense to an action on notes given for the purchase money, when he retains the deed, remains in the possession, and has been subjected to no inconvenience or expense on account of the alleged defective title: *Grubbs v. Barber*, 102 Ind. 131 (1 N. E. 636). The reason for this rule is that the purchaser, by accepting an estate and retaining possession thereof, is estopped from denying the title under which he holds. If he would rescind the contract of purchase on account of a defect in the title, or for any other breach of the agreement, he must restore the possession and estate to the vendor: *Marsh v. Thompson*, 102 Ind. 272 (1 N. E. 630); *Jackson v. McGinness*, 14 Pa. St. 331; *McIndoe v. Morman*, 26 Wis. 588 (7 Am. Rep. 96); *Diggle v. Boulden*, 48 Wis. 477 (4 N. W. 678); *Hill v. Winn*, 60 Ga. 337. The answer having interposed a defense to an action at law on the note, the nature of the estate created by the agreement to convey real property must be determined by the rules of law and not by the maxims of equity. In *Burkhart v. Howard*, 14 Or. 38 (12 Pac. 79), it was held, in a suit in equity, that a bond for a deed transferred to the obligee the equitable estate in the premises, while the obligor held the legal title as security for the payment of the pur-

chase money. This conclusion is reached by invoking the maxim that equity treats that as done which was intended, and considers the vendor as a trustee for the purchaser of the estate agreed to be sold and the purchaser as a trustee of the purchase money for the vendor: 1 Sugden on Vendors, 175. "In law," says Mr. Pomeroy in his work on Specific Performance of Contracts, § 314, "a contract for the sale of land is wholly, in every particular, executory, and produces no effect upon the respective estates and titles of the parties. The vendor remains to all intents the owner of the land; he can convey it free from any legal claim or incumbrance; he can devise it; on his death, intestate, it descends to his heirs; the contract in no manner interferes with his legal right to and estate in the land; and he is simply subjected to the legal duty of performing the contract, or paying such damages as a jury should award. On the other hand, the vendee acquires no interest whatever in the land; his right is a mere thing in action; and his duty is a debt—an obligation—to pay the price; and on his death both this right and this duty pass to his personal representatives, and not to his heirs; in short, he obtains at law no real property or interest in real property; the relations between the two parties are wholly personal. No change is made until, by the execution and delivery of a deed of conveyance, the estate in the land passes to the vendee." A bond for a title is not distinguishable in its ordinary operation and effect from a simple agreement for the same purpose: 1 Warvelle on Vendors and Purchasers, 146.

"Formerly," says this author, at page 397 of the text-book cited, "every estate was legal, in the proper acceptation of that term, and in the contemplation of law there is and can be but one estate, which may properly be denominated the 'legal estate.' But the introduction of what were known as 'uses,' and the subsequent

origination of trusts, where one party held the title, but upon some trust or confidence for another, early led the court of chancery to take cognizance of the rights of the beneficiary, and thus there grew up a double ownership of lands thus situated, the interests which were cognizable as such only in a court of equity taking the name of 'equitable' to distinguish them from 'legal' estates." Tested by this rule, the defendants, not having acquired, at law, any estate in the premises, were under no obligation, in an action for the purchase money, to plead or prove a tender of the deed conveying to plaintiff any possible right they might have in the premises as a condition precedent to the rescission of the contract; and, this being so, the obligees in the bond could assign their respective rights at law without the execution of a conveyance.

The defendants allege that they surrendered the possession of the premises to the plaintiff, and, if this be true, it must be conceded that they showed a right, upon a failure of the title and breach of the conditions of the bond, to rescind the contract, for, as was said by Mr. Justice THOMPSON in *Bank of Columbia v. Hagner*, 26 U. S. (1 Peters), 455, "The possession was taken, doubtless, under a belief that the contract would be performed by the plaintiff, and a full title conveyed to him; but, if the contract was unexecuted, the defendant had a right to disaffirm it, and restore the possession; and could have sustained an action to recover back the purchase money, had it been paid." The defendants further allege that they demanded of plaintiff a conveyance of the premises and right of way according to the terms and conditions of the contract, and this would imply that she was requested to name each of the makers of the note as grantees in the deed. The statute declares "The person to whom a tender is made shall at the time specify any objection he may have to the money, instrument, or other

property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards": Hill's Code, § 854. It must be presumed that the plaintiff tendered a warranty deed, since she was required by the contract to do so, and, having complied therewith, no objections that the defendants could have made to the terms of the instrument would have been availing, and they were not obliged to allege that they specified the reasons of their objections to the title. The bond for a deed not having provided that the defendants should have the possession of the premises, the right of possession remained with the legal title, and was therefore in the plaintiff, and, as the note was executed for the entire purchase money before the surrender of the possession by plaintiff, it is quite evident the license given the defendants to occupy the land formed no part of the consideration of the note.

The plaintiff having instituted an action on the note, the important question for consideration is whether the defendants could plead a failure of consideration as a defense to the action, or whether their remedy was by a cross-bill in equity. It must be admitted that plaintiff's complaint stated a good cause of action, but, had she relied upon the contract instead of the note, it would have been necessary for her to allege and prove that she duly performed, or offered to perform, all the terms of her agreement, or that she was prevented from so doing by the defendants. Although the contract may be under seal, yet the purchaser, if he has a right to rescind it, may bring an action for money had and received, to recover both the purchase money and interest: 1 Sugden on Vendors, 238. So, too, a vendor in the recovery of pecuniary damages has an adequate remedy at law, yet

he has a choice of remedies, and may resort either to a court of law or a court of equity: *Crary v. Smith*, 2 N. Y. 60; *Brown v. Haff*, 5 Paige Ch. 240 (28 Am. Dec. 425). In *School District v. Rogers*, 8 Iowa, 316, it appeared in evidence that the consideration of the note which was the subject of the action was a house and lot sold by the plaintiff to the defendant, a deed of conveyance of which was to be made on the payment of the note; and the court was asked to charge the jury that "if the consideration of the note was real estate sold, before the plaintiff can recover the amount thereof he must show that he has made and tendered, or offered to make and tender, to defendant a conveyance of the real estate," which instruction being refused, a judgment was rendered for the plaintiff, in reversing which the court said: "In refusing to give the instruction we think the court erred. Under the issue joined, and under the evidence before the court, we think the instruction was proper to be given. When it is made to appear that the conveyance was to be made upon the payment of the purchase money, the courts regard the two acts as so far dependent that it is held that to entitle the plaintiff to recover he must show a performance, or offer to perform, the contract on his part, unless the defendant has waived a tender of the deed."

In *Leonard v. Bates*, 1 Blackf. 171, an action was instituted on an obligation to purchase a tract of land, to which the defendant pleaded that he executed the instrument in consideration that the vendor would make to him a good and sufficient deed in fee simple, and that, although he had fully kept his part of the agreement, the plaintiff, not having any title to the said land, neither did nor could make to him the said deed, but had wholly failed and refused to do so, wherefore he alleged that the consideration of the obligation had altogether failed. To this

answer a demurrer was sustained, and, a judgment having been rendered in favor of the plaintiff, BLACKFORD, J., in reversing it, says: "The undertaking to make a good and sufficient deed in fee simple is nothing more nor less than to execute a clear and perfect title. The actual doing of that was the consideration of the defendant's promise. By this plea, the defendant not only denies the performance by the plaintiff of the precedent condition, but also disputes his ability to perform it. Hence, if the consideration was duly stated, it becomes necessary for the maintenance of the suit that the plaintiff, in his replication, should state the goodness of his title, and show that he had done everything in his power to perform his part of the contract. Instead of such a reply, the plaintiff demurs to the plea; and by thus admitting that he never had any title, he puts an end at once to the idea of his being able to make any." The contract in the case at bar was wholly executory, and the payment of the purchase money and the tender of the deed were to occur simultaneously, rendering the acts to be performed mutual and concurrent, so that upon allegation of a failure of the consideration it was the duty of the plaintiff to meet the issue, and prove a performance upon her part of all the terms of the agreement: *Frink v. Thomas*, 20 Or. 265 (12 L. R. A. 239, 25 Pac. 717). It follows that the judgment is reversed, and the cause remanded, with instructions to overrule the demurrer, and it is so ordered.

REVERSED.

Decided December 21, 1896.

DAY v. LARSEN.

(47 Pac. 101.)

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WHEN AN ATTORNEY'S LIEN ATTACHES TO A JUDGMENT—CODE. § 1044.—An attorney's lien does not attach to a judgment, or become binding on the judgment debtor, until the attorney has given notice of his lien to such debtor, and filed the original with the clerk of the court where the judgment was entered, as required by section 1044 of Hill's Code; so that if the debtor pays or settles the judgment before notice of the lien is served, the lien will not attach, regardless of whether the satisfaction has been entered or not.*

From Multnomah: E. D. SHATTUCK, Judge.

This is an appeal from an order of the Circuit Judge upholding the clerk of his court in refusing to satisfy on the record a certain judgment. The facts are fully stated in the opinion.

REVERSED.

For appellant there was a brief by *Messrs. Milton W. Smith and Walter S. Perry*, with an oral argument by *Mr. Perry*.

For respondent there was a brief by *Messrs. Michael J. MacMahon and Allan R. Joy*, with an oral argument by *Mr. MacMahon*.

Opinion by MR. JUSTICE BEAN.

This is a summary proceeding against the clerk of the trial court to compel him to enter of record the sat-

*The case of *Hanna v. Island Coal Co.*, 51 Am. St. Rep. 246 (Ind.), is much like the present case, except that the clandestine settlement was made before trial. Appended to the case is an extended monographic note showing when and for what services an attorney's lien may be acquired, how it may be lost or waived, and how the lien is affected by a settlement with the opposing party made without the attorney's knowledge.—REPORTER.

isfaction of a judgment. The facts are that on March 11, 1895, a judgment was rendered in a civil action in favor of Joe Day and against E. S. Larsen for the sum of \$138.20, besides costs and disbursements. This judgment was secretly paid in full to Day on the 15th of the same month, and the judgment creditor duly executed and acknowledged a certificate of satisfaction thereof in writing. After payment, but before the certificate was tendered to the clerk for filing, or any demand made upon him to enter satisfaction of the judgment, the attorneys of the plaintiff duly served and filed a notice of lien thereon for their compensation for prosecuting the action, and on account thereof the clerk refused to satisfy the judgment of record, which action was approved by the court.

It was claimed in the court below that the certificate of satisfaction was not executed until after the notice of the attorneys' lien had been served and filed, and was dated back for the purpose of defrauding them out of their compensation. This contention, however, was not supported by the evidence, and therefore the only question in this case is, At what time does the lien of an attorney attach to a judgment recovered by him as against the judgment debtor? And this question must be determined from the provisions of the statute. It is unnecessary to stop to inquire as to an attorney's rights in this regard at common law, for our statute covers the entire subject, gives the lien, and specifically points out when and upon what terms and conditions it shall attach, or, as put by Mr. Justice ELLIOTT in a similar case, "the statute is now the source from which the lien is derived, and it can only exist as the statute creates it": *Alderman v. Nelson*, 111 Ind. 255. By section 1044 of Hill's Code, it is provided that an attorney has a lien "upon a judgment or decree to the

extent of the compensation specially agreed on from the giving notice thereof to the party against whom the judgment or decree is given, and filing the original with the clerk where such judgment or decree is entered and docketed." These words carry their meaning plain upon their face, and fix as the time when the lien shall attach as against the judgment debtor the giving of notice to him and filing the same with the clerk. The right to acquire the lien is a privilege of which the attorney may avail himself, by giving and filing the notice as required by the statute, but he has no lien or claim upon the judgment, as against the judgment debtor, prior to that time. As to him the notice creates and originates the lien, and the statute specifically fixes the time from which it shall exist. He is a stranger to the contractual relations between the attorney and his client, and no right can be acquired against him under the statute before the prescribed notice is given. If, before that time, he makes a bona fide settlement of the judgment with the creditor, it is clear that there is nothing in existence to which the lien can attach, and any subsequent notice is therefore inoperative to create any liability against him. This is in harmony with the construction of analogous statutes in other states: *Henry v. Traynor*, 42 Minn. 234; *Elliott v. Atkins*, 26 Neb. 409; *Pirie v. Harkness*, 3 So. Dak. 178 (52 N. W. 581); *Boston Smelting Co. v. Pless*, 9 Colo. 112. It follows, from what has been said, that the order appealed from must be reversed, and this cause remanded to the court below with directions to order the judgment in question to be satisfied of record.

REVERSED.

Argued January 7; decided February 21. 1897.

SOUTHERN OREGON CO. v. COOS CO.

(47 Pac. 584.)

1. TIME WITHIN WHICH WRIT OF REVIEW MAY BE TAKEN—CODE, § 590.—Hill's Code, § 590, providing that a writ of review shall not be allowed unless application be made within six months from the decision complained of, is a conclusive limitation of the power of the supervising court to issue the writ: *Or. & Wash. Sav. Bank v. Jordan*, 16 Or. 117, cited and followed.
2. FINAL ORDER—WRIT OF REVIEW.—An order of the County Court, levying a tax after equalizing and considering the assessment roll, is a final order from which a writ of review may be prosecuted.
3. DESCRIPTION OF ORDER TO BE REVIEWED—CODE, § 584.—A petition for a writ of review sufficiently describes the order to be reviewed when it states the substance and purpose of the order; a misstatement of the date is immaterial.
4. SUFFICIENCY OF PETITION FOR WRIT OF REVIEW—CODE, § 584.—Under section 584 of Hill's Code, which provides that the petition of the plaintiff shall set forth the errors alleged to have been committed, a statement in the petition that the inferior court acted without jurisdiction is clearly insufficient, for it states only a conclusion of law.
5. IDEM.—A petition for a writ of review, under section 584 of Hill's Code, must be complete within itself, and reference cannot be had to the return to supply omissions in the petition; and, moreover, the petition must contain such a statement of the errors alleged to have been committed as will inform interested persons of the questions intended to be raised.

From Coos: J. C. FULLERTON, Judge.

Petition for writ of review by the Southern Pacific Company against Coos County and its officers, to avoid the results of certain tax levies. The Circuit Court, after a hearing on the merits, dismissed the petition, whereupon this appeal was prosecuted by plaintiff.

AFFIRMED.

For appellant there was a brief over the names of *J. W. Hamilton, Dolph, Mallory & Simon*, and *John A. Gray*, with an oral argument by *Mr. Rufus Mallory* and *Mr. Hamilton*.

For respondents there was a brief over the names of *Geo. M. Brown*, District Attorney, and *S. H. Hazard*, with an oral argument by *Mr. Hazard*.

Opinion by MR. JUSTICE WOLVERTON.

On September 15, 1894, the Southern Oregon Company petitioned the court below for a writ of review, for the purpose of having certified up for review the records and proceedings of the County Court of Coos County in the matter of the assessment of plaintiff's property for the year 1893, including the orders of the board of equalization respecting the same. The petition states, in substance, that plaintiff is a corporation organized and existing under the laws of Oregon; that at the times therein mentioned Schroeder was county judge, and Stitt and Ross commissioners of said county; that Coos County is a public corporation, and the defendant Gage its sheriff; that on September 13, 1894, said sheriff, by virtue of a tax warrant issued out of the County Court of Coos County, directing him to collect the delinquent taxes for the year 1893, levied upon certain personal property of plaintiff, and threatens to sell the same and apply the proceeds thereof to the payment of \$7,046.42, the amount of plaintiff's alleged taxes for the year 1893; that the warrant so issued is based upon an order of the County Court, made and entered July 13, 1894, directing the county clerk to issue the same for the collection of delinquent taxes due upon several lists, including that of 1893; that the only ground for making the order is a pretended assessment of the property within the county for the year named; that the roll was not filed until September 25, 1893, and after the expiration of any time allowed by the County Court for filing the same; that the assessor failed to give notice of the meeting of the board of equaliza-

tion; that no meeting of the board was ever held, as provided by law, for the equalization of such assessment; that plaintiff was afforded no opportunity by said board to apply for the correction of its assessment; and that there was no assessment of plaintiff's property for the year 1893, other than that referred to in said petition. The errors assigned are: First, the order of the County Court is insufficient, in that it does not show that any taxes had been levied upon plaintiff's property for the year 1893, or that any such remained unpaid or delinquent; second, that it appears from the record that no taxes had been levied upon its property for 1893; third, that the County Court was without jurisdiction to make the order of July 13, 1894; fourth, the County Court did not find what sum, if any, was due from plaintiff for taxes levied upon its property for the year named; and, fifth, plaintiff was not notified of the intended proceedings.

The return to the writ shows that orders were made and proceedings had as follows: On Monday, July 10, 1893, the County Court, at an adjourned meeting, made an order extending the time for the return of the assessment roll to the fourth Monday in September, 1893, at which time the board of equalization for Coos County convened, and adjourned to the following day. The plaintiff appeared at the adjourned meeting by R. E. Shine, its secretary, and later on by John A. Gray, its attorney, and requested a reduction of its assessments, as did other persons. After hearing some testimony offered by the parties, it adjourned to the following day, and then until October 16, 1893, when the hearing was resumed, and continued from day to day until October 23, 1893, at which date it made and entered an order reducing the plaintiff's assessment between \$5,000 and \$6,000. The board again convened on the following day, and filed in the County Court a certified statement of its doings and proceedings,

from which it appears that it reduced the valuation of all property appearing upon the assessment roll, "except money, notes, accounts, improvements, and goods, wares, and merchandise, twenty-five per cent. of the value fixed by the assessor." On the 3d day of January, 1894, the plaintiff appeared and petitioned the court, then in regular session, for a reduction of its assessment for 1893, claiming that the action of the board of equalization was irregular and illegal, as having continued its sessions beyond the week of its first meeting. The court continued the hearing from time to time, until January 20, 1894, when it finally determined that the action of the board was irregular, but approved the reduction made by it of plaintiff's assessment, and reduced the same largely in addition thereto. On January 23, the County Court levied a tax of nineteen mills on the dollar, and on March 8, 1894, a warrant was issued to the sheriff for the collection thereof. On April 12 it made an order enlarging the time within which the taxes so levied were to become delinquent to June 20, 1894, and extending the time for the return of the delinquent list to July 5, 1894. On July 12, 1894, the sheriff made an irregular return of the same by certificate, and on the following day the County Court made the order specified in the petition as made of the 13th and the warrant was issued by the clerk in pursuance of this order July 17, 1894, and is the same under which it is alleged the sheriff is acting. The defendant moved the court below to quash the writ, and, the motion being allowed, it was adjudged that the proceedings be dismissed, from which judgment this appeal is prosecuted.

The motion to quash presents two questions that go to the sufficiency of the petition for the writ, which are decisive of the case. The first is that it does not state sufficient facts to authorize the issuance of the writ, in that it does not describe with convenient certainty the

decision or determination sought to be reviewed, nor does it assign or specify the errors which it is sought to have corrected; and, second, that the decisions and determinations sought to be reviewed were all made more than six months prior to the application for the writ except the order of the County Court for July 12, 1894. We will treat of these in their reverse order.

1. The statute provides that in no case shall the writ be allowed unless application therefor be made within six months from the date of the decision or determination complained of: Hill's Code, § 590. This limitation is conclusive of the power of the supervising court to issue it: *Rhea v. Umatilla County*, 2 Or. 298, approved in *Or. & Wash. Sav. Bank v. Jordan*, 16 Or. 117 (17 Pac. 621); 2 Spelling's Extraordinary Relief, § 1902; *Cunningham v. La Crosse Packet Co.*, 10 Minn. 299; *People ex rel. v. Hildreth*, 126 N. Y. 360 (27 N. E. 558); *Chamberlain v. Barclay*, 13 N. J. Law, 244.

2. It is one of the purposes of the present writ to have reviewed the decisions and determinations of several functionaries, including the assessor, board of equalization, and the County Court of Coos County, touching the making up of the assessment roll of 1893. The assessor returned the roll September 25, 1893, and the board of equalization met on the same day, and continued its sessions from time to time until October 24 following, when it certified its proceedings to the County Court, and thenceforth ceased to exercise its functions as such board. The County Court, having begun its examination of the roll January 3, 1894, made its final determination concerning it on the 20th, and levied the tax on the 23d. It is now claimed that the return of the assessor was not made within the enlarged time granted by order of the County Court; that the board of equalization acted without jurisdiction, by reason of an alleged failure of the

assessor to give proper notice of its meeting, and by reason of having continued its examination and correction of the roll for a greater period of time than one week; and that the acts of the County Court were coram non judice, because of the alleged irregularities of the board of equalization; hence, that the assessment is void. It seems to be conceded by both sides that the tax roll, when completed, partakes of the nature of a judgment against the individual taxpayer: *Rhea v. Umatilla Co.*, 2 Or. 298; Hill's Code, § 2792; 25 Am. & Eng. Enc. Law (1st Ed.), 292; 1 Blackwell on Tax Titles, § 331. The roll is completed, in so far as any judicial action is required of the several functionaries engaged in its preparation, when the tax levy is made by the County Court. This is the final decision or determination against the taxpayer, and fixes the amount of taxes he is required to pay the county, and what remains to be done in extending and copying the roll is merely clerical and ministerial. Now, we have seen that the levy was made on January 23, 1894, more than six months prior to the filing of the petition; hence the writ came too late to have reviewed any action of the County Court or the board of equalization or the assessor in making up and completing the assessment roll for 1893. We are not to be understood as indicating by anything we have said what determinations of either of these functionaries are so far final as to support the writ; but that the order levying the tax is at least such a final order, from which a review will lie, and, the plaintiff having failed to apply for the writ within six months from the date of such levy, its remedy by review with a purpose of having determined whether or not the assessment and levy were regularly made and by competent authority is now cut off by statute.

3. This conclusion eliminates from our consideration all questions presented at the hearing, except the

regularity and validity of the order of July 12, 1894; and, as to this, the defendants' first objection goes to the sufficiency of the assignments of error in the petition for the writ respecting it. We think the order complained of is sufficiently described. The gist of it is set out, and we know from an inspection of the petition what the decision or determination of the court was, and the error in the allegations touching the date of its entry is of no consequence.

4. Plaintiff insisted at the argument that the court was without jurisdiction to make the order, for two reasons: One is that the sheriff had failed to make or annex to his return of delinquent taxes an affidavit to the effect that the sums therein returned as unpaid were not paid, and that he had not upon diligent inquiry been able to discover any goods or chattels belonging to the persons charged with such unpaid taxes, whereon he could levy the same, as required by section 2811, Hill's Code; and the other is that there was no valid assessment for 1893 upon which to base the order. While it is true the answer to the writ shows that the sheriff certified his return, instead of making affidavit thereto, the petition is entirely silent on the subject. There is no showing therein indicating the nature thereof, or whether a return of any kind was or was not made; nor does it anywhere question the jurisdiction of the County Court on the ground that the sheriff failed to verify his return by affidavit. The third assignment of error is, in substance, that the order was made without jurisdiction, but this is a conclusion of law, and would seem to be a deduction from the two preceding assignments, which are, in effect, that no tax had been levied upon plaintiff's property for the year 1893, and that the order itself does not show such levy.

5. The statute (Hill's Code, § 584) provides that the

writ shall be allowed, upon the petition of the plaintiff describing the decision or determination sought to be reviewed with convenient certainty, and setting forth the errors alleged to have been committed. This requirement is no departure from the ordinary rules of pleading pertaining to applications for the writ. The petition should state such facts as would show *prima facie*, by an inspection of it, that the inferior court or tribunal has acted without jurisdiction, or has exercised its functions erroneously; and, as in other pleadings, a statement of a conclusion of law is bad: 2 Spelling's Extraordinary Relief, §§ 1992 and 1993. Under the Georgia Code, whereby it is required that the petition "shall plainly and distinctly set forth the errors complained of," it has been held that the petition should set forth the ground of error: *Western, etc., R. R. Co. v. Jackson*, 81 Ga. 478 (8 S. E. 209). In Michigan it has become authoritatively settled that the object of a similar statute is "to require such a statement of the grounds of the allegation of error as will inform the court and opposite party of the nature of the questions intended to be raised": *Fowler v. D. & M. R. R. Co.*, 7 Mich. 79. And the error must be specifically assigned: *Witherspoon v. Clegg*, 42 Mich. 484 (4 N. W. 209); *Welch v. Bagg*, 12 Mich. 42; *Rodman v. Clark*, 81 Mich. 466 (45 N. W. 1001); 4 Enc. Pl. & Pr. 149. As bearing upon and in further support of these propositions, we cite: *Independent Pub. Co. v. Am. Press Ass'n*, 102 Ala. 475 (15 South, 947, 950); *Wood v. Lake*, 3 Colo. App. 284 (33 Pac. 80); *Harrison v. Chipp*, 25 Ill. 575; *Chambers v. Lewis*, 9 Iowa, 583; *People v. Com's of Taxes and Assessments*, 26 N. Y. Sup. 941; *People v. Board of Assessors*, 32 N. Y. Sup. 344; *Brandon v. Superior Court*, 60 Cal. 576. Considered in the light of these authorities, the petition is clearly insufficient to present the question insisted upon, viz.: that the court was without jurisdiction to make the order

of July 12, 1894, on account of the failure of the sheriff to make affidavit to his return of delinquent taxes as required by section 2811; and, this being so, we are precluded from looking into it upon the record.

Nor can we by this proceeding examine into the validity of the assessment roll, to determine whether or not the County Court was warranted in making the order. The office of the writ is to revise the decisions and determinations of the inferior court or tribunal, and the supervising court has the power to affirm, modify, reverse, or amend the same; but, being precluded by the lapse of time from reviewing the determinations of the functionaries whose duty it was to make up the roll, we cannot revise anything these tribunals have done respecting it. So that the regularity of the assessment and levy has become a matter wholly collateral to the question whether or not the order of July 12 was properly and authoritatively made and entered. The review is a direct proceeding, and was designed to promote a revision of the decisions of inferior tribunals, and to correct errors therein; but, if used to try collateral issues of this kind, it would result in a defeat of the very purposes of the writ. Of course, if there were no assessment and levy whatever, or if the tax itself were vicious, or such as the legislature could not lawfully impose, the order would undoubtedly be void, as would any process designed for the enforcement of the payment of the tax; but we think it a sufficient basis for such an order that there is a delinquent list regularly returned by the proper officer, and that in determining its validity it is unnecessary to inquire into the regularity of the original roll.

AFFIRMED.

Decided February 23, 1897.

HOLBROOK v. INVESTMENT CO.

(47 Pac. 920.)

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VENDOR AND PURCHASER—BOND FOR DEED.—A vendor in an action at law in Oregon has the right, as between itself and the defaulting purchaser, to declare the contract at an end, and to enforce the provisions as to forfeiture agreed upon: *Sayre v. Mohney*, 30 Or. —, cited.

BROKERS' CONTRACT—COMMISSIONS.—Real estate brokers agreed to sell certain lots in consideration of all the proceeds above \$800 an acre. It was also agreed that the price might be paid in installments of \$5 or more a month, the brokers to retain \$10 from the first two installments, and one-half of each installment thereafter till their commissions were paid. Later there was a supplementary agreement that, if any of the purchasers on credit should forfeit their contracts, all forfeited installments paid to the brokers on such sales might be retained as commissions; and, should they effect a resale on credit, all installments thereafter paid were to be divided equally, till the vendor should have received under the new sale \$800 an acre. *Held*, that, where contracts were forfeited for non-payment, unpaid commissions for the original sales were also forfeited.

From Multnomah: E. D. SHATTUCK, Judge.

Action by F. B. Holbrook and another to recover from the Investment Company certain commissions alleged to be due for selling certain lots. There was a judgment for plaintiffs, and defendant appeals.

REVERSED.

For appellant there was a brief over the name of *Williams, Wood & Linthicum*, with an oral argument by *Mr. Geo. H. Williams*.

For respondents there was a brief over the name of *George, Gregory & Duniway*, with an oral argument by *Mr. Ralph R. Duniway*.

Opinion by MR. CHIEF JUSTICE MOORE.

This is an action by S. B. Rigger and F. B. Holbrook against the Investment Company, a corporation, to recover compensation for services in negotiating sales of real property on credit, the contracts for which were cancelled by the defendant for failure of the purchasers to pay the installments of the purchase price at the time agreed upon. The record discloses that on October 7, 1890, the plaintiffs, as partners, were employed by the defendant to negotiate the sale of certain town lots in Irvington Park, Multnomah County, for which service it agreed to pay them all sums realized therefor in excess of \$800 per acre, and it was also agreed that the purchase price might be paid in installments of not less than \$5 per month, without interest, in which case the plaintiffs were to retain the first two payments, not exceeding \$10, and one-half of each installment thereafter, until their compensation was fully paid. On February 12, 1891, the parties entered into a supplementary agreement, by the terms of which it was provided that if any of the persons to whom these lots had been sold or might be sold upon credit should forfeit their rights, all forfeited installments paid to the plaintiffs on such sales might be retained as commissions, and, should they effect a resale of the premises on credit, all installments thereafter paid were to be divided equally between the plaintiffs and defendant, until the latter should receive, under the new sale, \$800 per acre. On October 7, 1891, Rigger having assigned to Holbrook all his interest in the contract, the partnership existing between them was dissolved, Rigger retiring therefrom, in consideration of which Holbrook agreed to pay him twenty-five per cent. of the gross profits thereafter derived from the sale of said lots; to collect at his own expense and pay him one-half of all moneys due the firm, and also to pay all debts that he might thereafter incur on account of the prosecution of

the business, while each agreed to pay one-half of the firm debts then outstanding. On January 9, 1892, Rigger, for a valuable consideration, transferred to Holbrook and one E. Williams all his right, title, and interest in and to the contract entered into between the Investment Company and Rigger & Holbrook, excepting, however, his interest in the commissions due or to become due on lots sold up to that date. On September 3, 1891, the plaintiffs sold on credit to one Mrs. C. E. Stevenson four lots in said tract, for \$675, of which she paid \$20 down, and promised to pay \$20 on the 3d of each month thereafter until the purchase price was fully paid; whereupon the defendant entered into a contract with her upon these terms, which stipulated that time was of the essence of the agreement, and that the defendant had the option to declare the payments made thereon forfeited, and to cancel the contract, unless the payments were made at the time agreed upon. Mrs. Stevenson, under said contract, paid to the plaintiffs \$300, of which they retained \$170, and paid the remainder to the defendant as its part thereof, but she made default in the payment of the installment which became due November 3, 1892, and, having made no further payments thereon, the defendant, on July 24, 1893, exercised the option reserved in the contract, and gave her notice thereof, whereupon she surrendered her rights under the agreement, and delivered it up to the defendant to be cancelled. Thereafter Holbrook and Williams resold the said lots to her, and she entered into a new contract with the defendant for the purchase thereof, in which the payments theretofore made were taken into account, and paid the money due under the new contract to Holbrook, who retained one-half thereof, and paid the remainder to the defendant. The plaintiffs allege that, on November 3, 1892, there was due on Mrs. Stevenson's contract \$350, of which they are

entitled to \$177.55, when collected, and that thereafter, and before the expiration of the time limited therefor, she tendered the amount due, but the defendant refused to receive the same, and, without the knowledge or consent of the plaintiffs, and with intent to deprive them of their compensation, it obtained a surrender of her interest in the land, and cancelled her contract; and that the plaintiff thereafter demanded of the defendant said \$177.55, but it refused to pay the same. The complaint contains six separate but similar causes of action, and a prayer for judgment for the sum of \$951.11.

The defendant, after denying the material allegations of the first cause of action, sets out copies of the several contracts hereinbefore mentioned, and alleges that it was the duty of the plaintiffs to collect the money as it became due from Mrs. Stevenson under her contract, but that they neglected or were unable to do so after November 3, 1892, after which time she made no payment or offer of payment thereon, and that on July 24, 1893, defendant exercised the option contained in the contract, and that the cancellation was made with the full knowledge and consent of Holbrook as the representative of the plaintiffs. The answers to the other causes of action are, in effect, the same as the foregoing. The reply having put in issue the allegations of new matter contained in the answer, a trial was had before the court, at which the defendant, after the plaintiffs had introduced their evidence and rested, moved the court for a judgment of non-suit, but the motion was overruled, and the court found the facts in substance as hereinbefore set forth, and gave judgment for the plaintiffs in the amount demanded, from which the defendant appeals. Within ten days from the time this appeal was perfected, the plaintiff Riggen obtained an order of the court for leave to issue execution to enforce the payment of the judgment, notwithstanding the appeal,

and from this order the defendant also appeals. An execution having been issued in pursuance of the foregoing order, the court, upon motion, ordered the sheriff to enforce the writ as to the costs and disbursements, but to collect from the defendant only one-half of the judgment, and to return the writ when satisfied to that extent, whereupon Riggen appeals from this latter order.

Counsel for the company contend that their client, in the agreements entered into with the plaintiffs, reserved the right to declare a forfeiture of any contract of purchase for the mere non-payment of any installment due thereon, and to order a resale of the premises affected thereby, and in case of such declaration of forfeiture it was also understood that plaintiff's right to any unpaid commissions thereon should be forfeited; that, the resales of lots having been made after the dissolution of the co-partnership, the firm of Riggen & Holbrook have no interest in any commissions claimed on account of such resales; that the court erred in its refusal to grant a judgment of non-suit, and that the findings of fact do not support the judgment, for which reason it should be reversed; while counsel for the plaintiffs maintain that the written agreement of the defendant to convey any of the lots in Irvington Park transferred to the obligee an equitable estate in the premises, the surrender of which, upon a declaration of forfeiture thereof, was tantamount to a settlement of an existing obligation, and amounted to a substituted payment of the debt due under the contract of purchase, which at once entitled the plaintiffs to their commissions. The question involved renders an examination and construction of the contracts entered into between the parties necessary. The first contained the following provisions: "In case lots are sold on time, in pursuance of this agreement, it is agreed that said lots may be sold on installments of not less than five dollars

(\$5.00) per month, with interest; and in such case the parties of the second part shall retain the first two installments, not exceeding ten dollars (\$10.00), and out of each installment thereafter one-half thereof, till their commission or compensation shall have been fully paid." This clause was modified by the contract entered into on February 12, 1891, which contained the following stipulation: "In all cases where sales have been or shall be made by the parties of the second part of lots under said agreement of October 7, 1890, and the purchasers shall forfeit their rights under such sales, and a second sale is had, all installments paid to the parties of the second part under such forfeited contracts shall be considered payments upon the commission of the parties of the second part under the terms of said agreement of October 7, 1890; that is to say, that in case the parties of the second part shall have received two installments upon such forfeited contract, and a new sale is made, all installments under said new sale shall be divided equally between the parties of the first and second part, until the parties of the first part shall have received thereout the full amount coming to them under the terms of said agreement, which is a modification of the same." It will be observed that the parties to these contracts did not expressly provide that the defendant should declare a forfeiture of the rights of the purchasers under their respective agreements for the non-payment of any installment when due, but it was clearly understood that some of these agreements would probably be forfeited, anticipating which the parties hereto agreed upon a method for the disposal of the property affected thereby, and a settlement of the purchase price and commissions in case of a resale thereof. In the contracts entered into between the defendants and the purchasers of these lots, it was stipulated that time should be of the essence of the agreement, and that

the obligor should have the option to declare the amounts paid thereon forfeited, and the contract cancelled, in case of default in any payment; but the plaintiffs, not having been parties thereto, were probably not bound by the terms of these agreements. In equity, it has been held in this State that a bond for a deed transferred to the obligee the equitable estate in the premises, while the obligor held the legal title as security for the payment of the purchase money (*Burkhart v. Howard*, 14 Or. 39; 12 Pac. 79); but at law the rule is otherwise; the vendee under a bond for a deed, it has been held, acquires no interest or estate whatever in the land agreed to be conveyed: *Sayre v. Mohney*, 30 Or. (47 Pac. 197). And the case at bar being an action at law, the defendant had the undoubted right, as between itself and a defaulting purchaser, to declare the contract at an end, and to enforce the provisions agreed upon: 2 Warvelle on Vendors, 818; Pomeroy's Specific Performance, § 390; *Snider v. Lehnherr*, 5 Or. 385; *Frink v. Thomas*, 20 Or. 265 (12 L. R. A. 239, 25 Pac. 717).

This being so, the question is presented whether the plaintiffs, under their contracts with the defendant, are bound by such forfeiture and cancellation. The rule is well settled that a real estate broker, in the absence of any agreement to the contrary, has earned his commission when he effects an actual sale, or produces a purchaser who is ready, able, and willing to purchase upon the terms indicated by the principal: *Fisk v. Henarie*, 13 Or. 156 (9 Pac. 322); *Kyle v. Rippey*, 20 Or. 446 (26 Pac. 308); *Booth v. Moody*, 30 Or. (46 Pac. 884). But here the rule is varied by the agreement that on the sale of a lot upon credit, the plaintiffs should retain as their commission the first two installments not exceeding \$10, and one-half of each installment thereafter until their compensation was fully paid. Under this clause, it must

be conceded the plaintiffs could not recover from the defendant any part of their commissions, except as the purchasers paid the installments stipulated in their agreements. An examination of the second contract entered into between the plaintiffs and defendant discloses that a forfeiture of the rights of purchasers and a second sale of the same premises presumptively operated beneficially to each party, since the amount paid thereon was retained by each; and, while the plaintiffs, on the subsequent sale, were not entitled to the two first installments, they were to receive one-half of each installment until they obtained the full amount coming to them as if no previous sale had been made. In other words, the plaintiffs, upon a declaration of forfeiture, retained the money they had received, and also obtained another commission for securing a purchaser for the same property. Prior to the dissolution of the partnership, Riggen would probably have reaped a decided advantage from the forfeiture of these agreements and a resale of the lots; and hence the contract with the defendant of February 12, 1891, prescribing the mode of adjusting such commissions, was a valuable property right, which inured equally to each partner, and, this being so, when Riggen, upon a dissolution of the partnership, assigned to Holbrook all his interest in the contract for the sale of Irvington Park lots, the latter thereby acquired whatever interest the former had therein, and, as a consideration therefor, Holbrook agreed to pay him twenty-five per cent. of the gross profits to be derived from all subsequent sales. Under this agreement Riggen became entitled to commissions upon the resale of lots, the agreement to purchase which had been declared forfeited; but, when he assigned to Holbrook & Williams all his interest in the contract for the sale of lots in Irvington Park, he was no longer

entitled to any portion of the commissions arising from sales or resales of this property thereafter to be made.

Counsel for plaintiffs cite and rely upon the case of *Bush v. Abraham*, 25 Or. 336 (35 Pac. 1066), in support of the theory that the surrender by the purchaser of his right under an agreement to convey reinvested the defendant with the equitable estate in the premises, and, being a substituted payment, amounted to a settlement by the purchaser of the obligation, and at once rendered the commissions on account of such sale due and payable, notwithstanding the forfeiture. The rule announced in that case cannot, in our judgment, have any application to the case at bar, for the reason that the parties stipulated, impliedly, for the forfeiture, and also that the commissions were not to be paid except as they were collected from the purchasers. It is true the parties did not in direct terms stipulate that the defendant should have the right to declare a forfeiture of any of the contracts of purchase, or that, upon a declaration of such forfeiture, their commissions on account of the sale should also be forfeited; but, having agreed to take another commission on account of a resale of the lots declared forfeited, we think it is inferred from a fair construction of their contracts that they agreed to these terms; and, as the forfeitures complained of were declared by the defendant after Rikken had assigned his interest to Holbrook & Williams, neither he nor the firm of which he was a member had any interest in the commissions thereafter earned on account of the sales or resales of any of this property; and, this being so, the findings of fact do not support the judgment, and the court erred in its refusal to grant a judgment of non-suit, for which reasons the judgment is reversed, and the cause will be remanded with instructions to dismiss the action.

The judgment being erroneous, the order allowing the

issuance of an execution thereon must be reversed also, and the appeal of Rigger from the order requiring the writ to be returned is dismissed.

REVERSED.

Argued December 2, 1896; decided January 11, 1897.

BARGER v. BARGER.

(47 Pac. 702.)

DISTINCTION BETWEEN RESULTING AND CONSTRUCTIVE TRUSTS.—A resulting trust is one where property is purchased with the money of another, though the title is not taken in such other's name; while a constructive trust ensues where the purchase is made and the title acquired secretly, and in violation of some duty to the cestui que trust; and in both cases the evidence that the money was furnished by and was expended for the alleged beneficiary must be clear and convincing: *Springer v. Young*, 14 Or. 280; and *Sisemore v. Pelton*, 17 Or. 546, applied.

PARTIAL RESULTING TRUST.—Where a trust is claimed to the extent of a part only, it must be decisively shown just what proportion of the price was paid by the alleged beneficiary, and that the payment was for some specified interest in the estate.

TIME WHEN TRUST ARISES.—A trust must always originate at the time the title is acquired, and the price for the interest claimed must then be paid or secured: *Taylor v. Miles*, 19 Or. 553, cited and followed.

TRACING TRUST FUND INTO TRUST PROPERTY.—So long as trust property can be traced and distinguished, although in changed form, it may be reclaimed; but when the identity of the original property is lost the trust escapes; from which it follows that either the entire ownership of the changed form of property must be established, or the ownership of some aliquot part of such property to sustain a trust therein.

IMPLIED TRUST—PURCHASE WITH WIFE'S MONEY.—Where a husband, without objection, uses his wife's money jointly with his own in a series of business ventures, no trust in favor of the wife can attach to a tract of land bought partly with the proceeds of the business and partly with borrowed money.

From Multnomah: LOYAL B. STEARNS, Judge.

Suit in equity by Rebecca J. Barger against Cyrus W. Barger and Eliza Helm, her children, and others, to have a trust declared in certain land in plaintiff's favor. The lower court entered a pro forma decree for the defendants,

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confirming the report of Jarvis Varnal Beach, Esq., referee. Plaintiff appeals.

AFFIRMED.

For appellant there was a brief by *Mr. Cicero M. Idleman*, with an oral argument by *Mr. Idleman* and *Mr. William P. Lord*.

For respondents Helm and Barger there was a brief over the names of *Masters & Merrick*, and *Cleland & Cleland*, with an oral argument by *Mr. William Y. Masters* and *Mr. John B. Cleland*.

For respondent Perry G. Baker there was a brief and an oral argument by *Mr. Julius C. Moreland*.

Opinion by MR. JUSTICE WOLVERTON.

This suit was instituted November 1, 1894, for the purpose of charging the defendants Cyrus W. Barger and Eliza Helm as trustees of certain lands in Multnomah County, Oregon, for the use and benefit of plaintiff. From the testimony it appears the plaintiff was the wife of John Barger, now deceased, and that Cyrus W. Barger and Eliza Helm are their children. Barger left a will by which he devised and bequeathed to plaintiff all his real and personal property for and during her natural life, or so long as she remained his widow, but in case of her marriage, then a one-third interest absolute in such property. Subject to this provision, the property went to the children in equal portions. The plaintiff and her husband settled in Marion County, near Silverton, in 1847, upon a tract of land entered by them as a donation claim, upon which they lived until 1864. In the meantime Barger was engaged in mining in California and Idaho, in freighting from the Willamette Valley to the mines

issuance of an execution thereon must be reversed also, and the appeal of Riggen from the order requiring the writ to be returned is dismissed.

REVERSED.

Argued December 2, 1896; decided January 11, 1897.

BARGER v. BARGER.

(47 Pac. 702.)

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DISTINCTION BETWEEN RESULTING AND CONSTRUCTIVE TRUSTS.—A resulting trust is one where property is purchased with the money of another, though the title is not taken in such other's name; while a constructive trust ensues where the purchase is made and the title acquired secretly, and in violation of some duty to the cestui que trust; and in both cases the evidence that the money was furnished by and was expended for the alleged beneficiary must be clear and convincing: *Springer v. Young*, 14 Or. 280; and *Sisemore v. Pelton*, 17 Or. 546, applied.

PARTIAL RESULTING TRUST.—Where a trust is claimed to the extent of a part only, it must be decisively shown just what proportion of the price was paid by the alleged beneficiary, and that the payment was for some specified interest in the estate.

TIME WHEN TRUST ARISES.—A trust must always originate at the time the title is acquired, and the price for the interest claimed must then be paid or secured: *Taylor v. Miles*, 19 Or. 553, cited and followed.

TRACING TRUST FUND INTO TRUST PROPERTY.—So long as trust property can be traced and distinguished, although in changed form, it may be reclaimed; but when the identity of the original property is lost the trust escapes; from which it follows that either the entire ownership of the changed form of property must be established, or the ownership of some aliquot part of such property to sustain a trust therein.

IMPLIED TRUST—PURCHASE WITH WIFE'S MONEY.—Where a husband, without objection, uses his wife's money jointly with his own in a series of business ventures, no trust in favor of the wife can attach to a tract of land bought partly with the proceeds of the business and partly with borrowed money.

From Multnomah: LOYAL B. STEARNS, Judge.

Suit in equity by Rebecca J. Barger against Cyrus W. Barger and Eliza Helm, her children, and others, to have a trust declared in certain land in plaintiff's favor. The lower court entered a pro forma decree for the defendants,

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THE UNITED STATES OF AMERICA
DO hereby certify that
[Name] is a citizen of the United States of America
and is entitled to the rights and privileges of citizenship
under the Constitution and laws of the United States.
IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the
[Name] at [City], [State], this [Date] day of [Month], [Year].
[Signature]
[Title]

in Eastern Oregon and Idaho, and in the flouring mill business at Silverton. He made and lost money in these enterprises, but it is now impossible to tell what was the net result. A house and some lots in Salem, purchased by him while thus engaged, remain as part of the assets of his estate, and were appraised as such at \$1,000. The consideration named in the deed, however, is \$4,005, but it is highly improbable that they were worth that amount, and it is difficult to determine from the evidence what their real value was when purchased. In the early part of 1866 the plaintiff and her husband sold their donation land claim, or rather what remained of it, for \$2,000. With the funds derived from this source, Barger purchased an interest in a ferry at Salem. Whether he invested other funds with it is by no means certain. He operated the ferry until September, 1867, when he sold out. The sum realized is put by witnesses at from \$2,500 to \$4,500. Out of these funds Barger paid a note which James Smith, the father of plaintiff, held against him for about \$1,400. In the spring of 1868 he purchased about 115 head of cattle, at a cost of something like \$1,955, and borrowed a thousand dollars to enable him to pay for the same and defray the expenses of driving them to eastern Washington. There is, however, some dispute as to the amount of this last loan, which was also had of James Smith. The defendant R. W. Helm, the husband of Eliza, bought cattle at the same time, and he and Barger took their families and cattle to Klickitat County, Washington Territory, in July of that year. In 1869 Barger and Helm formed a partnership in the cattle business, each putting in his individual stock, and in the adjustment of such assets there was an excess due Helm of about \$1,200. About February, 1871, they made a sale to Phelps & Wadleigh, out of which Barger realized, after payment of said excess, and expenses and debts incurred

in the business, about \$7,500. Two thousand of this was applied in payment of a balance due on his note to Seth Smith, a brother of plaintiff, given some time previous to the purchase of the ferry. In June, 1871, Barger bought ten acres of the land in dispute for \$1,300, and in July the remaining twenty acres at a consideration of \$3,100, and took deeds therefor in his own name. The funds from the sale of cattle being a little short of enough to pay for the two tracts and meet some other expenses, some few hundred dollars were borrowed from Jennings Smith, another brother of plaintiff. In 1872 Barger and his wife, having in the meantime left Klickitat, returned thereto and made their home there until 1884, when Barger was adjudged insane, and the plaintiff was appointed his guardian. Her account in January, 1886, shows his estate in Washington to have been worth nearly \$10,000. She takes credit therein for expenditures of \$3,545.85, reports \$3,322.82 on hand to be loaned, and values the real estate at \$2,000.

In 1865 Simeon Jennings, an uncle of the plaintiff, died in West Virginia, leaving a large estate to numerous relatives, and from this source and from her father's estate the plaintiff received a considerable sum of money, which was paid to her from time to time, ranging from the fall of 1867 down to a time subsequent to the purchase of the land in dispute by Barger. She claims to have received two payments amounting to about \$900 from her uncle's estate prior to the purchase of the cattle, which is probably correct; and to establish the trust relations she claims that one-half of the proceeds of the donation land claim was her money, and this, she testifies, was invested in the ferry by Barger with her consent; that he expended in payment of his debts all the proceeds of the sale of the ferry except \$1,000, and that this sum, together with the \$900 received from Simeon Jennings'

estate, was at that time, with her consent, invested in the cattle; that no partnership ever existed in the cattle business between Barger and Helm; and that from the proceeds of the cattle, together with a small sum borrowed by Barger from her brother, the land in dispute was purchased, all with her consent. It is probable that her money repaid the amount borrowed by Barger with which to purchase the cattle, that it contributed in part to the expenses of the cattle business, was used to pay a considerable portion of the \$3,000 note of Barger to her brother Seth Smith, and to repay the money borrowed to make out the purchase price of the land. No other direct use of her money can be traced. In answer to interrogatories, she testified concerning the purchase of the cattle as follows: "Q. What was the agreement and understanding between you and your husband at that time? A. The understanding was this: It was my money, and I gave it to him to invest in cattle hoping he might make a profit out of it, and he could get out of debt, and we could have something left for me. Q. Anything said about what interest he was to have in the cattle? A. No, sir; there was nothing said about it. Q. Anything said about your interest? A. Nothing. Q. Anything said about how he was to get any benefit out of it? A. Nothing. Q. Your idea was that the money was to be handled for the good of the family? A. It was more for the good of myself. Q. It was really to get Mr. Barger out of debt, and help the family along? A. I do not know whether there was anything said about that. We went up there partially on Willard's account; we thought by buying cattle it would give him a start and something to do, and we might make something for ourselves." She further testified, touching the purchase of the land: "Q. Was there anything said between you, or by you to him, about what kind of an investment you preferred to have?

A. Yes; we talked that over and he asked me what I wanted done with my money, and I said the best thing is to first pay your debts, and we can decide what to do with the remainder later on. After we went to the Waldo Hills, where my brother Jennings Smith lived, we talked it over, and before we left the Yakima country, I said it would be the best plan to put the money in the bank until we decide, so part of the money was left in Portland, reserving enough to pay that debt to my brother Seth. * * * We finally decided to buy some land, although land was high, but we thought it safer. He came to Portland, and he wanted me very much to come, but I did not feel very well and did not feel able to ride on horseback that far, so he came down himself, and with my permission he bought one piece of land, although the land was very high." She relates that a similar conversation attended the second purchase.

In support of her claim it was argued that Barger was practically bankrupt at the time he purchased the cattle, and testimony is adduced touching admissions made by him from time to time to that effect, and to the further purport that the money with which he bought the cattle and the land belonged to his wife. We have stated the case thus far as strongly for the plaintiff as the facts will admit. Her testimony is weakened somewhat by the fact that her husband's will received her approval when made, and by the further fact that in September, 1891, she instituted another suit to declare this trust, based at that time upon an alleged express agreement and understanding that the property so purchased in his name should inure to her sole use and benefit. Other circumstances might be enumerated having the same tendency, to which it is not deemed important to refer. It is quite certain that the money borrowed by Barger from plaintiff's father was used in the purchase of the cattle, and it is likely that

84 U. S. (17 Wall.) 59; *Baker v. Vining*, 30 Me. 127 (1 Am. Dec. 617); Browne on the Statute of Frauds, § 86. So it is, also, as respects constructive trusts—the evidence that the purchase was made with trust funds must be clear and unmistakable: 2 Pomeroy's Equity Jurisprudence, § 1049. And a trust of either description must arise, if at all, at the time of the conveyance, and the money or other consideration for the deed which is the foundation of the trust must then be paid or secured to be paid: *Taylor v. Miles*, 19 Or. 553 (25 Pac. 143); *Beecher v. Wilson*, 84 Va. 813 (6 S. E. 211, 10 Am. St. Rep. 883); *White v. Carpenter*, 2 Paige Ch. 238; *Niver v. Crane*, 98 N. Y. 47; *Westerfield v. Kimmer*, 82 Ind. 369; *Appeal of Cross*, 97 Pa. St. 474; *Botsford v. Burr*, 2 John. Ch. 408; *Midmer v. Midmer*, 26 N. J. Eq. 302.

These principles governing the establishment of implied trusts such as we are considering are in strict accord with the essential nature of the trusts themselves. The fund, or other form of property which it is sought to trace into a different form, does not lose its identity, while it may change in semblance, as, if a sum of money is expended for a parcel of land, or a band of cattle exchanged for stock in a bank, the property form is changed, but the identity of the original form is traceable and distinguishable. The same may be true where several parties have contributed in aliquot parts, the relative proportion in the changed form of the property may be traced and distinguished. That which was the property of the cestui que trust in the first instance continues to be his property in equity throughout all its metamorphoses, but when the identity is lost the trust escapes: See *Perry v. McHenry*, 13 Ill. 227, 228; *Niver v. Crane*, 98 N. Y. 47. It is, therefore, the entire ownership, speaking in an equitable sense, that must be established, and not some equitable lien upon the changed form of property;

and, if established, the cestui que trust takes the property thus identified, not that his demand be satisfied out of it. Hence it is that payments made in common by the one asserting the claim and the alleged trustee, unless made in aliquot parts; or payments made out of commingled and indistinguishable trust funds, do not evidence a resulting or constructive trust, simply because the identical property is not traceable or recognizable in its changed conditions. It cannot be said that the cestui que trust is the equitable owner of the new form of property: *Cutler v. Tuttle*, 19 N. J. Eq. 561; *Ferris v. Van Vechten*, 73 N. Y. 120; and *Browne on the Statute of Frauds*, § 86.

With these premises let us ascertain whether the plaintiff has established either a resulting or constructive trust. The first step in the consideration is the purchase of the ferry. This was probably bought with the joint funds of the husband and wife, and of equal proportions, derived from the sale of the donation land claim; and, as their relative rights stood while the husband held the legal title to the ferry, she may have been entitled to have had a trust declared in her behalf in and to an undivided one-half of this property, had it not been that she consented to the purchase with her funds, and presumably to the taking of the title in her husband's name. Such being the case, it is questionable whether or not they did not attempt the establishment of an express trust, and the trust not having been declared in writing was within the statute of frauds, and not provable. But, it is contended that if Barger purchased the cattle with plaintiff's money, or if he acted as her agent in making the purchase and in transporting them to eastern Washington and caring for them, using her money for the purpose, then the land, having been purchased with the proceeds of the cattle, belonged to her in equity—that

is, as to such land he was her trustee. This conclusion involves both the resulting and constructive phase of an implied trust, seeing that the title was taken in his name. The proposition in either phase may be conceded, but the difficulty lies in the premises. It is not clear that the cattle were bought entirely with her funds, or that any definite, certain, or distinguishable interest therein was so bought—probably not, as it is impossible to determine what aliquot or proportional part of the funds were contributed by her towards their purchase and maintenance upon the range. And it is quite clear that he did not act as her agent either in the purchase or in the management of the stock business in eastern Washington. This latter proposition is evidenced from the fact that he borrowed money upon his individual responsibility with which to contribute towards the purchase, and the further fact that he treated the cattle as his own, with her knowledge and approval, by turning them in as assets of the copartnership formed between him and Helm in 1869. One of the primary purposes of purchasing the cattle, as was testified by the plaintiff, was to give their son, Cyrus W., then quite a young man, a start in business. And this is further evidenced by the fact that he was given a share in their increase for his services in taking care of them.

As a resultant proposition it is urged that taking the title to the land by the husband in his own name, when the consideration paid therefor was the plaintiff's money, made him a trustee of the title for her. But this assumes that the land was purchased with her money. It is true that the purchase was made mostly with the proceeds of the sale of cattle; but, again, the husband borrowed a portion of it upon his individual responsibility. She says the purchases were made with her consent, and she probably knew from the beginning where the title stood.

There is no setting aside or designation of the proceeds of the cattle or any part thereof as her individual money, nor was it so treated; the fact being that part of it was deposited in the bank in the husband's name, and the remainder used in payment of his debts and family expenses. It is not deducible from the testimony that the plaintiff's money was used to pay for the land. If it was, she consented to its use for that purpose, and from the whole course of their dealing it is quite apparent that she consented to his taking the title in his own name, and she is not now in a position to charge his devisees as trustees of the title for her use and benefit.

The course of dealing between the plaintiff and her husband has been about this: 'The husband has, with the wife's consent, used her funds in conjunction with his own in the promotion of his business. The funds of each have been so used that they became indistinguishably intermingled and confused, but the business carried on and prosecuted with their joint funds was clearly the business of the husband. This is manifest from the fact that the title of every piece of property, whether real or personal, purchased or obtained during their married life was taken in his own name, and while held was treated by both parties, so far as we are advised, as his property. Under these conditions it is impossible for the court to trace any particular funds of the plaintiff into the lands in dispute, or to say that the lands represent her funds, and, as a result, cannot declare the trust. There is no doubt but that she has contributed in a large measure to the promotion of her husband's business, but the money furnished by her with that end in view must be regarded as a loan rather than the imposition of trust obligations upon him. They were apparently quite prosperous, having together accumulated a comfortable estate, and, while it may be conceded that the plaintiff

ought to be in some manner reimbursed for such use of her funds, it is clear that we cannot give her relief in this proceeding. The decree appealed from will therefore be affirmed, and the defendants' costs in this court taxed to plaintiff.

AFFIRMED.

Argued November 4, 1896; decided January 18, 1897.

MITCHELL v. HOLMAN.

(47 Pac. 616.)

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JURISDICTION OF EQUITY—SET-OFF AGAINST INSOLVENT JUDGMENT DEBTOR.*—Equity will entertain a suit to compel the allowance of a set-off against a judgment on a note obtained by one who held it only as collateral for a debt less than such note, where this latter fact was not known to the maker until the trial of the law action (and so was not pleaded), and the payee is insolvent.

REFORMATION OF WRITTEN CONTRACTS—MISTAKE.—Equity will not reform a written contract on the ground of mistake unless the party asking reformation shows clearly, not only that the alleged mistake exists, but that it was mutual, and was not caused by his negligence: *Epstein v. State Ins. Co.*, 21 Or. 179; and *Kleinsorge v. Rohse*, 25 Or. 51, approved and followed.

REFORMATION OF CONTRACT—MISTAKE AS TO LEGAL EFFECT.—That the legal effect of the language used in a contract is different from what one of the parties supposed it to be is not a ground for relief from the contract, or for reforming it, after one party has executed his part: *Archer v. California Lumber Co.*, 24 Or. 341, cited and approved.

CORPORATIONS—OFFICER'S COMPENSATION.—Where an officer of a corporation performs for it services that are outside of his official duties he is entitled to receive their reasonable value, and the doctrine that such an officer acquires no legal claim for services performed in the discharge of his duties unless the compensation therefor was fixed by a resolution or by-law of the board of directors prior to the performance of the service, has no application: *Wood v. Lost Lake Mfg. Co.*, 23 Or. 20, distinguished.

*NOTE.—The authorities bearing on this question are collected and arranged in a note on the General Principles Governing Equitable Set-off after Insolvency, printed with *St. Paul Trust Co. v. Leck*, 47 Am. St. Rep. 578. In 54 Am. St. Rep. is a valuable monograph on Relief in Equity, other than by Appellate Proceedings, against Judgments, Decrees, and other Judicial Determinations, in which (at

From Marion: H. H. HEWITT, Judge.

This suit was brought by S. Z. Mitchell, E. P. McCornack, and others against Thos. Holman, A. S. Bush, and others, to compel the allowance of an offset to a judgment obtained against the plaintiffs by Bush on a note which he held as collateral from Holman. That case was appealed on the question whether an agreement in a note to pay an attorney fee "in case of suit" would support a recovery of such a fee in an action on the note, the distinction between the two classes of proceedings being still maintained in this State: *Burrage v. Bonanza Gold Min. Co.*, 12 Or. 169. The appeal was dismissed. *Bush v. Mitchell*, 28 Or. 92. In this present suit there was a decree for defendants, and plaintiffs appeal.

MODIFIED.

For appellants there was a brief and an oral argument by *Messrs. Ossian Franklin Paxton* and *Geo. G. Bingham*.

For respondent there was a brief and an oral argument by *Messrs. H. J. Bigger* and *Tilmon Ford*.

Opinion by MR. JUSTICE BEAN.

This suit arises out of the following facts: On February 24, 1893, the defendant Bush recovered judgment against the plaintiffs for the sum of \$24,566.50 on a promissory note, of date August 31, 1892, executed by them to the defendant Holman, and by him indorsed and transferred to Bush before maturity, as collateral security for about \$16,000. Prior to the commencement of this

pages 224 to 229) is a discussion of the rule requiring equitable defenses to have been presented in the former case, and the exceptions thereto. See also pages 763, 766, and 768 of an exhaustive note in 31 L. R. A., on Injunctions against Judgments for Defenses existing prior to their Rendition.—REPORTER.

present suit, the plaintiffs paid Mr. Bush \$22,379.97 on the judgment, and, as an offset to the balance of \$2,938, tendered a receipt in full for a claim of that amount which they held against the defendant Holman, and demanded satisfaction of the judgment, which being refused, they brought this suit for the purpose of offsetting the amount due them from Holman against the balance of the Bush judgment. The amount paid Mr. Bush being sufficient to pay and discharge his demand against Holman, it is admitted that he has no interest in the balance due on the judgment, except as trustee for his co-defendant, and hence this controversy is between plaintiffs and Holman. As a ground for equitable jurisdiction, it is averred that at the time the action on the note was brought by Mr. Bush, and up to the trial, plaintiffs supposed and believed that he owned the note in his own right, and so had no opportunity, if otherwise permissible, to plead the amount due them from Holman as a set-off in such action, and that at the time of the commencement of this suit Holman was practically insolvent. These allegations are sufficiently supported by the testimony for the purposes of this case. The evidence shows that plaintiffs had no knowledge of the character or nature of Mr. Bush's interest in the note until it was developed on the trial, and that when this present suit was commenced Holman was very largely indebted, and his property incumbered to such an extent as to render it highly inequitable and unjust for him to enforce the judgment under the circumstances of the case. We shall, therefore, without further reference to this branch of the case, proceed to a consideration of the merits.

On the 15th of April, 1893, a corporation known as the Oregon Electric Light Company, of which Holman was the manager, was and for a long time prior thereto had been supplying certain of the State buildings at Salem

with electric light, under a contract with the State for the stipulated and agreed compensation of \$5,000 per annum, payable quarterly, and at that time there was due and unpaid thereon the sum of \$2,708.33. The capital stock of the corporation was divided into 500 shares, of \$100 each, of which the defendant Holman owned 220 shares, D. P. Thompson 220, and J. Loewenberg 60. On the day named, the defendant Holman and Mr. Thompson sold and assigned for a good and valuable consideration all their stock to the plaintiffs Mitchell, Anson, and Paxton, and one E. P. McCornack, and delivered to them all the corporate records and property. On the 17th of the same month, a meeting of the stockholders was held, all the stockholders of the company being present either in person or by proxy, at which new directors were elected, who immediately qualified, and assumed control of the corporation, and elected a new set of corporate officers. On May 5, 1893, after he had parted with all his stock, and therefore ceased to be an officer of the corporation, and without any authority from it whatever, Holman, representing himself to be still the manager of the corporation, collected from the State the amount due the company on the lighting contract, and used a part thereof in payment of the operating expenses of the corporation during the time it was being earned, and retained the remainder. On the 12th of August, 1893, the Oregon Electric Light Co. duly sold and assigned its claim against Holman for the money so collected by him to the plaintiffs in this suit, and they are now the owners and holders thereof, and seek to set off the amount of such claim against the judgment in favor of Bush, but which in fact belongs to Holman. If these were all the facts in the case, there could be no question as to who should prevail in this suit. The money collected by Holman was due the corporation and not the stockholders, and when

he sold and assigned all his stock he ceased to be an officer of the corporation, or any longer interested therein, and had no more right to this money than he had to the plant or other property of the company. The corporation is an entity, separate and distinct from its stockholders, and the change of the latter could in no way affect its rights.

But Holman, to overcome the force of this position, alleges as a defense that the stock of himself and Thompson was sold to Mitchell, Anson, Paxton, and McCornack under and in pursuance of an option contained in a contract between himself, as the representative of all the stockholders of the corporation, and Anson, and McCornack, made on January 26, 1893, and that, as a part of such contract, he and his associates reserved the right to collect from the State any money due the corporation under the lighting contract referred to, at the time the option to purchase the stock should be exercised by Anson and McCornack. This contract is in writing, and contains no such stipulation or agreement; but Holman avers that it was omitted therefrom by a mutual mistake of the parties, and this is the only defense set up in the answer, and the controlling question in this case. Upon this issue the burden of proof is with him, and he must show by clear and satisfactory evidence, not only that there is a mistake in the written agreement, but that such mistake was mutual, or shared in by all the parties, and that it did not occur through his own negligence: *Lewis v. Lewis*, 5 Or. 169; *Stephens v. Murton*, 6 Or. 193; *Epstein v. State Ins. Co.*, 21 Or. 179 (27 Pac. 1045); *Kleinsorge v. Rohse*, 25 Or. 51 (34 Pac. 874). And this he has wholly failed to do. The written contract was prepared by the plaintiff Anson, and the undisputed evidence shows that he intentionally drew it in the precise form in which it was executed, and that no words were omitted which he

intended should be inserted, and that no words were included which he intended should be omitted. In short, there is not a particle of evidence in the entire record to show that the written contract is not just as Anson and McCornack intended it should be, and they both testify that it correctly expresses the terms of the agreement as actually made. It thus appears that if there is a mistake in the contract at all it is a mistake of Holman alone; and, while a mistake of one party to an agreement may in some instances be ground for the rescission of the contract, or afford a sufficient reason for a refusal by a court to enforce specific performance thereof, it clearly will furnish no ground for reforming it. And this for the paramount reason that, if the written contract should be reformed on proof of the mistake of one of the parties alone, great injustice might be done to the other by imposing upon him the consequences of a contract to which he had never assented, and which he may have been unwilling to make in the first instance. But, besides this, the undisputed evidence shows that after Anson drew the contract he submitted it to Holman for examination, who retained it for a couple of days for that purpose, and then signed it without objection, although it contains no reference to or mention of the amount due the corporation from the State of Oregon. This alone would probably be a sufficient bar to the relief sought, on the ground of negligence.

But it is claimed, and the court below found, that the deferred payment from the State was not in the minds of the parties at the time the contract was made, or during any negotiations pertaining thereto, and for that reason the written contract ought to be modified so as to exclude such claim against the State from its operation. Considering this to be true, it affords no ground at this time for the reformation of the contract actually made,

or for relief from the legal consequences thereof. If the parties did not make the contract they intended, or if the legal operation of the one made is different from what they expected, it might, perhaps, have been a sufficient ground for a refusal on the part of Holman to perform, but it affords no defense to this suit. The contract as made has been fully executed, and a court cannot now relieve either party from the legal consequences thereof: 15 Am. & Eng. Enc. Law (1st Ed.), 631. So that, on this record we do not see any grounds upon which the defendant can be relieved from the consequences of his contract, although it seems probable he did not suppose that the legal effect of the sale and transfer of his stock in the corporation would deprive him of the right to collect the money due from the State at that time. Such, however, is the effect, and the court cannot relieve against a mere mistake of that kind: *Archer v. California Lumber Co.*, 24 Or. 341 (33 Pac. 526). But it appears from the record that he paid \$1,222 of the debts of the corporation from the money so collected by him, and for this sum he is equitably entitled to a credit.

The doctrine that an officer of a corporation acquires no legal claim against it for services performed in the discharge of his official duties, unless a compensation therefor was fixed by resolution or by-law of the corporation prior to the performance of the services, has no application to the questions raised in this case. The services performed by Holman, and for which he was accustomed to receive compensation at the rate of \$100 per month, did not pertain to the duties devolving upon him as director and president of the corporation; and hence, under the rule announced in *Wood v. Lost Lake Mfg. Co.*, 23 Or. 20 (37 Am. St. Rep. 651, 23 Pac. 848), he is entitled to compensation upon a quantum meruit, and it is not questioned but what the services were reasonably worth

the sum charged therefor. It follows, therefore, that the decree of the court below must be modified; that plaintiffs be allowed a credit on the judgment against them in favor of Bush for the sum of \$1,486.33, with interest thereon at the rate of eight per cent. per annum from the 5th day of May, 1893; and that, upon the payment of the balance due thereon, the defendants satisfy the judgment. Neither party will recover costs.

MODIFIED.

Argued November 11, 1896; decided January 18, 1897; rehearing denied.

AVERY v. BUTLER.

(47 Pac. 706.)

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TIME FOR FILING MECHANIC'S LIEN—"REPAIRS" AND "OMISSIONS" DISTINGUISHED.—Where a building has been, by the owner or his agent, accepted as completed in accordance with the requirements of the building contract, the renewing by the contractor of defects caused by inferior workmanship or material, discovered after the acceptance, is considered a repair rather than an omission, and the time for filing a lien will begin to run from the date when the building was accepted, and not from the date when the repairs were completed, though the rule may be otherwise where work required by the contract has been omitted.

From Multnomah: MICHAEL G. MUNLY, Judge.

Suit by Avery & Opdycke against Butler & Dill, and others, to foreclose a mechanics' lien. The Builders' Sash & Door Mfg. Co. intervened to foreclose a lien, and from a decree dismissing its claims it appeals.

AFFIRMED.

For appellant there was a brief over the name of *Gammans & Lamson*, with an oral argument by *Mr. Geo. G. Gammans*.

For respondent there was a brief over the name of *Snow & McCamant*, with an oral argument by *Mr. Wallace McCamant*.

Opinion by MR. CHIEF JUSTICE MOORE.

This is a suit to foreclose a mechanics' lien upon a house and lot at Piedmont, Multnomah County, the property of the defendant the Investment Company, a corporation, but which it had agreed to sell and convey to the defendant Ben C. Irwin. The material facts are that on August 8, 1892, the Investment Company entered into a contract with the defendants Butler & Dill, by which the latter agreed to furnish the material and erect a house on said lot in consideration of \$2,312, \$1,500 to be paid as the work progressed, \$406 when the house was entirely completed and accepted, and \$406 thirty-five days after such final acceptance and surrender of the building to the owner. The contract, in referring to the manner and effect of such payments, contained the following stipulation: "It is also provided that in each of said cases a certificate be obtained and signed by the said F. Manson White, architect, none of which payments, except the final one, shall be considered as or understood to be an acceptance of any part or portion of the works herein agreed for." On November 28, 1892, Butler & Dill, claiming to have complied with the terms of the contract, quit working on the building, and on the 8th of the next month the architect, deeming it completed in accordance with the terms of the agreement, executed to the contractors a certificate for \$406, whereupon Irwin with his family took possession, and thereafter continued to occupy the house. The architect, in preparing the plans and specifications, omitted the window blinds, and, at his own expense, agreed to procure them, and, having done so, Butler & Dill, on December 13, returned and hung them, completing the work on the 19th of that month. The finishing lumber used in the building having begun to shrink, the architect, on December 18, wrote to the

contractors as follows: "I hereby notify you that I have rejected much of the mill work on the residence you are building at Piedmont for the Investment Company. All the doors, with one exception, are cracked and checked. The windows do not fit, and the trim has opened at all joinings. The work must be rectified at once, or it will be done at your expense." Thereafter he gave them a list of the imperfect material which he rejected, and notified them that the work must be made good before he could accept it, and on January 16, 1893, sent them the following notice: "You are hereby notified to proceed and complete the work on the residence you are building for the Investment Company at Piedmont. If this notice is not complied with within three days, we will, as agreed in contract, have the work done ourselves, and have the same charged to you." Butler & Dill, upon the receipt of these notices, thereafter removed the defective and supplied other and better material, completing the repairs on April 30, 1893. The plaintiffs allege that they furnished to Butler & Dill certain material to be used in the construction of said house, and, having perfected a lien thereon, commenced this suit for its foreclosure, alleging in their complaint that the defendant, the Builders' Sash & Door Manufacturing Company, a corporation, claimed some lien upon the premises, to which said company made answer in the nature of a cross-bill, alleging that it furnished to the contractors certain material to be used in the erection of the house, and to secure the payment of the amount due therefor, on May 26, 1893, and within thirty days from the completion of the building, filed its claim of lien in the proper office, and prayed that the same might be foreclosed. The Investment Company and Irwin, after denying the material allegations of the cross-bill, for further answer thereto, allege that the material so furnished by the Builders' Sash & Door Manufacturing

Company did not comply with the plans and specifications; that, after expending large sums in placing said material in the building, they were obliged to and did remove it therefrom, and replace it with other and suitable material; and that, having been compelled to do so, they had been damaged thereby in the sum of \$500. for which they prayed a decree. A reply having put in issue the allegations of new matter contained in the answer, a trial was had, at which the court, upon stipulation, dismissed the plaintiff's suit, and the cross-bills of some other lien claimants, and, having found that the cost of making the changes was greater than the amount claimed by the Builders' Sash & Door Manufacturing Company, decreed a dismissal of its cross-bill also, from which it appeals.

Counsel for the appellant contend that the court erred in its findings of fact, while it is maintained by counsel for the Investment Company and Irwin that the claim of lien now sought to be enforced was not filed within the time prescribed by law, and for this reason the decree should be affirmed. The certificate which called for the payment of the installment evidencing the final completion of the building having been obtained by Butler & Dill, they, on December 8, 1892, surrendered to the owner the possession of the property. From these facts it is evident that on this date each party considered the building entirely completed, as far as the contract was concerned, and the architect, having examined the house and being satisfied with the workmanship and material, accepted the same, although he thereafter wrote to the contractors requiring them "to proceed and complete the work," implying thereby that the building had not been completed; but, in view of the circumstances and acts of the parties, we deem the language a request to repair, rather than a demand to complete the building, for, at

the time this certificate was given, the defects in the material used in the building were not apparent, but, as the lumber seasoned, it began to shrink and check, thereby exhibiting its imperfections, upon the discovery of which the architect demanded that it should be removed, and better material substituted therefor. If the defects had been manifest from an inspection of the work at the date of the certificate, it must be presumed that the architect would not have given it to the builders, but, having done so, we must conclude he considered the building completed, as far as the contract was concerned, for, as a witness, he testifies that when the certificate was issued "the work was completed as called for in the contract."

It is true that Butler & Dill thereafter returned and hung the blinds, finishing the work on December 19, 1892, but, the architect having omitted them from the plans and specifications, this evidently was not a part of their original contract, and the certificate ought to be treated as evidence of the acceptance of their work, unless the provisions of the contract preclude such a construction. The final payment was to have been made thirty-five days after December 8, 1892, but, upon the discovery of the imperfections in the material, it was delayed until after April 30 of the next year, when the repairs were completed. The acceptance of the building must be determined as a question of fact. The stipulation in the contract to the effect that none but the final payment should be construed or understood to be an acceptance of any portion of the work was for the protection of the owner, and could, of course, be waived by him. Viewed in this light, it must be admitted, we think, that on December 8, 1892, the Investment Company, by its agent, F. Manson White, the architect, believing that Butler & Dill had fully performed their part of the contract, accepted the building, and issued to them a certificate evidencing this

fact. The blinds were not hung, however, until December 19, 1892, at which time the building was fully completed, unless the work thereafter done by Butler & Dill, in removing and substituting other material, served to postpone such completion until April 30, 1893.

This brings us to a consideration of the question whether, after a building which is sought to be subjected to the payment of a claim for labor and material has been accepted as completed according to the terms of the contract for its construction, the renewal or repair of some of its parts upon a discovery of their defects will extend the time for filing a lien otherwise excluded by lapse of time. While there is seemingly a conflict of authority upon this question, we think the better reason supports the rule that, after a structure has been completed, inspected, and approved by the owner or his lawful agent, any latent defects existing in the material or workmanship that may be cured by the builder upon the request of the owner, are to be considered as repairs, and not omissions in the performance of the original contract. When work demanded by the terms of the original contract has been omitted, the final completion of the structure dates from the time such omissions are supplied by the builder at the request of the owner, although in the meantime the latter may have taken possession of the property (*St. Louis National Stock Yards v. O'Reilly*, 85 Ill. 546; *Holden v. Winslow*, 18 Pa. St. 160); the rule seeming to be that while there is anything to do which it is the duty of the builder to perform, under the terms of the contract, the work upon which he is engaged is not completed until this obligation is accomplished (*Watts-Campbell Co. v. Yuengling*, 51 Hun. 302, 3 N. Y. Supp. 869); so that, if the window blinds were demanded by the terms of the original contract, the house could not be considered completed until they were supplied. So, too,

when the builder, after a substantial completion of the structure, at the request of the owner, makes additions to it which are useful or necessary to its enjoyment, the final completion dates from the time such additions are made: *Hofer's Appeal*, 116 Pa. St. 360 (9 Atl. 441); *Nichols v. Culver*, 51 Conn. 177. When the work has been apparently completed, but not accepted, the restoration by the builder of a part to which objection has been made is considered as a substitution under the terms of the original agreement, and not a repair, and therefore the statute begins to run only from the final completion of the imperfectly formed obligation: *Bruce v. Berg*, 8 Mo. App. 204; *Scott v. Cook*, 8 Mo. App. 193; *Worthen v. Cleaveland*, 129 Mass. 570; *Harrison v. Homeopathic Association*, 134 Pa. St. 558 (19 Atl. 804, 19 Am. St. Rep. 714); *Jeffersonville Water-Supply Co. v. Riter*, 138 Ind. 170 (37 N. E. 652). But, after a building has been accepted, repairs made thereon will not revive a lien for labor performed upon or materials furnished to be used in the structure prior to such acceptance: *Berry v. Turner*, 45 Wis. 105; *Dunn v. McKee*, 5 Sneed, 657. In *Conlee v. Clark* (Ind. app.), 42 N. E. 762, the Supreme Court of Indiana reached a different conclusion, which is much weakened, however, by the fact that two of the judges dissented from the opinion announced by the majority. The latter rule also prevails in California: *McIntyre v. Trautner*, 63 Cal. 429. In the case at bar, the house, in our judgment, was completed on December 19, 1892, when the blinds were hung, and any work thereafter done must be considered as repairs, and the notice of lien of the sash and door company, not having been filed within thirty days from the completion of the building, was not filed within the time prescribed by law (*Ainslie v. Kohn*, 16 Or. 363, 19 Pac. 97); and hence the decree is affirmed.

AFFIRMED.

Argued December 3, 1896; decided January 18, 1897; rehearing denied.

STULLER v. BAKER COUNTY.

(47 Pac. 705.)

ADVERSE PARTY—SERVICE OF NOTICE OF APPEAL.—In a suit against a county and its treasurer and sheriff to restrain the levy of a tax to meet the payment of certain county warrants which are claimed to have been illegally issued, the county is an adverse party so as to require it to be served with the notice of appeal by the other defendants from a decree granting the injunction, for if the decree be modified or reversed, its liability to pay will certainly be affected: *Hamilton v. Blair*, 23 Or. 64; *The Victorian*, 24 Or. 121; and *Moody v. Miller*, 24 Or. 179, approved and followed.

From Baker: ROBERT EAKIN, Judge.

Motion to dismiss an appeal.

DISMISSED.

Mr. H. E. Courtney, District Attorney, for the motion.

Mr. Chas. A. Johns, contra.

PER CURIAM. This is a motion to dismiss an appeal. The facts are that the plaintiffs, C. H. Stuller, M. J. Hamilton, and J. P. Bowen, instituted a suit against the defendants, Baker County, W. W. Travillian as county judge, William Brown and J. H. Hamilton as county commissioners, John H. Jett as county treasurer, and W. H. Kilburn as sheriff of said county, to restrain the levy of any tax to meet the payment of certain county warrants, which it is alleged were issued in violation of law; to enjoin the sheriff from receiving them in payment of taxes, and the treasurer from paying the same with county funds. At the trial the court found that a portion of said warrants had been unlawfully issued; that the sheriff threatened to receive them in payment of taxes, and the treasurer to receive and pay the same, and thereupon per-

petually enjoined the sheriff and treasurer from carrying such threats into execution. From this decree the defendants Jett and Kilburn attempted to appeal by serving a notice thereof upon the plaintiffs. The district attorney, appearing for the county, contends that the County of Baker and its judge and commissioners, being co-defendants, are adverse parties to the appellants (Hill's Code, § 537), and no service of such notice having been made upon them or either of them, this court has acquired no jurisdiction of the cause, for which reason he moves to dismiss the appeal. LORD, C. J., defining the term adverse party, says: "Evidently every party whose interest in relation to the judgment or decree appealed from is in conflict with the modification or reversal sought by the appeal": *The Victorian*, 24 Or. 121 (41 Am. St. Rep. 838, 32 Pac. 1040). To the same effect are: *Hamilton v. Blair*, 23 Or. 64 (31 Pac. 197); and *Moody v. Miller*, 24 Or. 179 (33 Pac. 402). If the decree of the court below should be reversed, and one entered here dissolving the injunction, the interests of the defendant Baker County would necessarily be injuriously affected thereby to the extent of the value of the warrants which the court found to be unlawfully issued, and hence it is an adverse party to the appellants (*Osborn v. Logus*, 28 Or. 302), and, not being served with notice of the appeal, the motion to dismiss must be sustained, and it is so ordered.

DISMISSED.

Argued November 19, 1896; decided January 18, 1897.

FIRST NAT. BANK v. LINN CO. BANK.

(47 Pac. 614.)

1. DECLARATIONS OF AGENT—RES GESTÆ.—Where the acts of an agent are binding on the principal, what was said by the agent at the time is admissible as part of the res gestæ; but where the declarations do not accompany the act, they are not admissible to charge the principal.
2. PRESUMPTION—NEGOTIABLE INSTRUMENT.—In support of a judgment, an instrument alleged to be a sight draft, drawn by an individual on a bank, will be presumed to be an ordinary bank check.
3. PRESENTING CHECK.—The holder's laches in presenting a check for payment will not discharge the drawer if there were no funds in the bank applicable to its payment, for the latter has suffered no loss by the delay.
4. PRESUMPTION—SUFFICIENCY OF TESTIMONY.—Alleged error in overruling a motion for a new trial on the ground that the verdict was against law will not be considered by the Supreme Court, where the bill of exceptions does not contain or purport to contain all the evidence given on the trial, or all the instructions of the court.

From Linn: GEO. H. BURNETT, Judge.

Action by the First National Bank of Portland, Oregon, against the Linn County National Bank of Albany, Oregon, to recover damages for the negligence of the latter in matter of collecting a certain draft. There was a judgment for defendant, and plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the name of *Cox, Cotton, Teal & Minor*, with an oral argument by *Mr. Joseph N. Teal*.

For respondent there was a brief and an oral argument by *Mr. James K. Weatherford*.

Opinion by MR. JUSTICE BEAN.

This is an action to recover for a loss suffered by the plaintiff on account of an alleged omission of duty on the part of the defendant. The substance of the complaint is that on the 16th day of June, 1893, the plaintiff bank forwarded by mail to the defendant bank, its regular agent and correspondent at Albany, Oregon, for collection and payment, a sight draft for \$1,000, drawn by one J. L. Cowan on the defendant bank in favor of Fleischer, Mayer & Co., and by them indorsed to the plaintiff for deposit on account; that the draft was received by the defendant on the day it was mailed, but it did not collect or pay the same, and negligently failed to notify the plaintiff of its non-collection or non-payment, and no action was taken thereon until the 24th of June, when, the defendant having in the meantime closed its doors and passed into the hands of a national bank examiner, such examiner, at the request of the plaintiff, presented the draft for payment, and, that being refused, the draft was duly protested; that in the regular course of business notice of its non-payment could and ought to have been communicated by the defendant to the plaintiff on June 17, and that then and thereafter until the 19th Cowan was possessed of ample property out of which plaintiff could have enforced payment thereof, if it had been notified that the same had not been paid; but that on the last-named date he became and has ever since been utterly insolvent, and the plaintiff has wholly lost the sum of money for which the draft was drawn, to its damage in the sum of \$1,000. The defendant denies the imputed negligence, and sets up in its answer that the draft was not received by it until the 24th of June, and was immediately protested for non-payment, and plaintiff duly notified, and this presents the controlling question in the case. The trial resulted in favor of defendant, and plaintiff appeals.

1. As already suggested, the important and indeed the only question of fact in issue on the trial was the date of the receipt of the draft by the defendant bank. As evidence tending to support the issue on its part, the plaintiff offered a letter written by the receiver of the defendant bank to the plaintiff's attorneys on July 28, 1893, in which it is stated that the draft in question was taken out of the postoffice at Albany "by Examiner Jennings on his arrival, June 21, and not received by the bank before suspension." The court refused to admit the letter in evidence, and this ruling is assigned as error. The contention for the plaintiff, as we understand it, is that the receiver of a national bank is the statutory agent of the bank, and that his admissions are competent evidence against the association. Conceding—but without deciding—this to be the law, the letter in question was clearly incompetent. It is at most but the narrative of a past event, and does not appear to have been made by the receiver as a part of some transaction then pending within the scope of his authority. Whenever what an agent did is admissible in evidence against his principal, it is competent to prove what he said about the act while doing it, because his declarations or statements made at the time are part of the *res gestae*. It is for this reason that they are admissible at all. As stated by Mr. Story, the rule is "that where the acts of an agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting a part of the *res gestae*": *I Story on Agency*, 134. The agent is the representative of the principal in the transaction of business embraced within his agency. Whatever, therefore, he lawfully does in the transaction of that business is the act of his principal; and his declarations respecting the subject-matter, if made at the same time and forming a part of the trans-

action, will also bind him. But when the right of the agent to act in a particular matter has ceased, or the declarations do not accompany the act, or are concerning a matter not within the scope of the agent's authority, the principal cannot be affected by them in any way: 1 Greenleaf on Evidence, § 113; Mechem on Agency, 115; *Anderson v. Rome R. R. Co.*, 54 N. Y. 334; *La Rue v. St. Anthony Elevator Co.*, 3 S. Dak. 637 (54 N. W. 806). Within this principle the declarations of the receiver offered in evidence were clearly incompetent; they were not only made more than a month after the alleged receipt of the draft, but were in reference to a matter of which the receiver did not claim to have any personal knowledge, and which evidently happened prior to his appointment. So it seems to us that, under no view of this case, was the letter admissible in evidence to charge the defendant with negligence.

2. It is also claimed that the court erred in charging the jury that negligence of the defendant bank in not making due presentment of the draft would not discharge the drawer from liability if he had no funds in the bank applicable to its payment. The form of the draft in question nowhere appears in the record, and therefore it must be assumed in favor of the judgment of the court below that it was an ordinary bank check drawn by Cowan upon the defendant bank, and, considering it as such, there was no error in the instruction.

3. The holder's laches in presenting a check for payment constitutes no defense in an action against the drawer, unless he is damaged by the delay, and then only to the extent of his loss. A check purports to be made upon a deposit to meet it, and presupposes funds of the drawer in the hands of the drawee. But if the drawer has no such funds at the time of drawing his check, or subsequently withdraws them, he commits a fraud upon

the payee, and can suffer no loss or damage from the holder's delay in respect to presentment or notice. In such case he is liable, and cannot insist upon a formal demand or notice of non-payment: 3 Randolph on Commercial Paper, §§ 1106, 1347; 2 Daniel on Negotiable Instruments, §§ 1587, 1596.

4. And, finally, it is claimed that the court erred in overruling plaintiff's motion for a new trial. Its counsel frankly concedes, however, that the ruling of the trial court on a motion for a new trial based on the insufficiency of the evidence or some other question of fact is not assignable error on appeal, but he seeks to make a distinction between the case stated and one where the motion is based upon the ground that the verdict is against law. He contends that from the undisputed facts and the instructions of the court in the case at bar the plaintiff was entitled to a verdict, and that the only remedy for the correction of the error of the jury was by motion for a new trial. But the facts on which his argument is based do not appear of record. The bill of exceptions does not contain, or purport to contain, all the evidence given on the trial, nor all the instructions of the court, and therefore we could not determine, even if the question was otherwise properly here, whether the verdict was against law or not. The pleadings present an issue of fact upon which defendant's liability admittedly depends, and, this issue having been determined by the jury in favor of the defendant, we are bound to assume, in the absence of an affirmative showing to the contrary, that the verdict was supported by the testimony. Finding no reversible error in the record, the judgment of the court below is affirmed.

AFFIRMED.

Argued December 16, 1896; decided February 8, 1897.

PATTERSON v. PILOT COMMISSIONERS.

(47 Pac. 786.)

PILOT COMMISSIONERS—RENEWAL OF LICENSE—VESTED RIGHT—NOTICE.—Under section 3904, Hill's Code, providing that the board of pilot commissioners shall issue pilot licenses in such number as shall seem appropriate, and section 3907, directing that licenses so granted shall be annually renewed, unless for good cause, to be determined by the board, in which case the holder of a license shall be notified ten days before the expiration of his license, and shall be entitled to a hearing, the board cannot decline to renew a license once issued, except for cause, to be determined in the manner and after the notice required by the latter section. After a license is once issued, the right to a renewal thereof becomes, under the statutes cited, a vested and valuable right, of which the holder cannot be deprived without notice, on any ground whatever.

From Clatsop: THOS. A. McBRIDE, Judge.

Mandamus by W. H. Patterson against Fox and others, constituting the State Board of Pilot Commissioners, to compel the issuance of a renewal license. The writ was made peremptory, and defendants appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Joel M. Long*.

For respondent there was a brief and an oral argument by *Mr. Chas. W. Fulton*.

Opinion by MR. JUSTICE BEAN.

This is a proceeding by mandamus to compel the board of pilot commissioners to renew a license issued to the petitioner as a river pilot in July, 1893, and comes here on an appeal from a judgment in his favor. The act creating the board of pilot commissioners and prescribing its powers and duties (Laws 1882, p. 15, sections 3892,

3933, Hill's Code) defines the bar and river pilot-grounds of the Columbia and Willamette Rivers, and prohibits any person from acting as a pilot thereon unless duly licensed so to do by the board. Section 13 thereof, being section 3904 of Hill's Code, provides that "the board has the power, and it is its duty, under this act, to maintain a sufficient number of capable pilots upon the bar and river pilot-grounds, and to exercise a general supervision over the subject of pilotage upon said grounds, and to that end may do and provide as follows: Examine and license pilots for said pilot-grounds, and limit the number of pilots and pilot-boats allowed thereon." Section 14 (Code, § 3905) requires the board to report annually to the governor. Section 15 (Code, § 3906) provides that licenses shall be issued for the term of one year; and section 16 (Code, § 3907) is as follows: "A license granted to a pilot under this act shall, as a matter of course, be annually renewed, unless the board determines that there is good cause for withholding such renewal, in which case it shall direct the secretary to notify such pilot in writing, at least ten days before the expiration of his license, of such determination and the cause thereof, and such pilot may thereupon apply within ten days for a hearing in regard to such cause for withholding the license, which shall be granted; and if upon such hearing it appears to the satisfaction of the board that there is no sufficient cause for withholding the license, it shall be renewed of course, and not otherwise." In 1889 the legislature amended section 13 by eliminating therefrom that portion authorizing the board to limit the number of pilots and pilot-boats allowed on the pilot-grounds (Laws 1889, p. 12), but in 1893 that provision was again restored (Laws 1893, p. 11), so that at the time this controversy arose the law in this respect was the same as originally enacted. The facts in the case are that in July, 1889, the petitioner

was duly licensed as a river pilot for the term of one year, and such license was thereafter annually renewed until 1894, when the board, without any previous notice to him whatever, declined to renew the same on the ground that in its judgment there was a sufficient number of pilots to meet the demands of commerce, and directed that the petitioner be so notified. No question was made, either in the court below or here, as to the competency of the petitioner to act as a river pilot, so that the only question to be determined in this proceeding is whether the board of pilot commissioners may, without notice, lawfully refuse to renew a license on the ground above stated.

The contention for the defendant is that the power to limit the number of pilots given by section 3904 of the Code includes the power to withhold from licensed pilots renewals of their annual licenses without notice; while the petitioner contends that a license duly issued must be annually renewed, unless such renewal is withheld for cause, to be determined in the manner and after the notice required by section 3907, and in this position we think he is correct. The several provisions of the statute on this question must be construed together, and effect given to all. Now, by section 3904 the board is clearly authorized and empowered to limit the number of pilots, but this power must be exercised in conformity with the provisions of section 3907, which plainly protects the holder of a license by requiring that it shall be annually renewed as a matter of course, unless, after notice, and a hearing if desired, the board shall determine that there is good cause for withholding such renewal. In other words, the effect of the statute is that the board may, in the first instance, refuse to license an applicant because the number of pilots allowed by it is complete, but, after having issued a license, it must renew the same as a matter of course unless it proceed in the manner pointed out. In

short, after a license is once issued, a right to the renewal thereof becomes, under the statute, a vested and valuable right, of which the holder cannot be deprived without notice. This, it seems to us, is the plain interpretation of the statute, and any other would be contrary to the expressed legislative will.

It was argued, however, for the defendants, that the provisions of section 3907 have reference only to a case where the refusal is to be based upon some reason personal to the particular pilot, but this is giving to the statute a construction unwarranted by its language. It clearly declares that a license granted to a pilot shall be renewed as a matter of course, unless he is notified of a determination not to renew it, and the cause thereof, and thus given an opportunity to be heard on the matter. The statute makes no distinction as to the method of procedure in a case where the pilot commissioners desire to withhold the renewal of a license because of the alleged incompetency or unfitness of a particular pilot, and one where they desire to withhold such renewal on the ground that the interests of commerce require the number of pilots to be reduced. In either case the pilot to be affected is entitled to notice, and an opportunity to present such reasons as he may have why the contemplated order should not be made. It may be within the official judgment and discretion of the board to reduce the number of pilots as their several licenses shall expire; but, if so, the law has provided that it shall not be done without notice. It was also urged at the argument that the board was justified in refusing to renew the license of the petitioner because he had not been engaged in the active pilot service during the previous year. But that question is not here. No notice was ever given him of the intention to withhold his license on that account.

AFFIRMED.

Decided February 8, 1897.

FOWLE v. HOUSE.

(47 Pac. 787.)

APPEAL FROM DECREE SUSTAINING DEMURRER—DISPOSITION OF CAUSE ON AFFIRMANCE.—Where a decree sustaining a demurrer to a complaint on the ground that it does not state a cause of suit is affirmed, final judgment will not be entered, but the cause will be remanded for such further proceedings as may be deemed proper: *Powell v. Dayton, etc., R. R. Co.*, 14 Or. 22, approved and followed.

From Polk: GEO. H. BURNETT, Judge.

Motion to recall mandate and amend the decree.

Mr. F. A. Chenoweth, for the motion.

No appearance for respondent.

PER CURIAM. The motion to recall the mandate is denied. The decree of the court below sustaining a demurrer to the complaint because it does not state facts sufficient to constitute a cause of suit was affirmed in this court (29 Or. 114, 44 Pac. 692); but no final disposition of the cause was made, it being remanded to the court below "for such further proceedings as may be deemed proper, not inconsistent with the opinion herein." Under the mandate sent down, the court was at liberty to determine in the first instance whether the plaintiff should be allowed to amend his complaint, and with the exercise of that discretion we cannot interfere by directing what course it shall pursue in the matter. This is the rule of practice in cases of this character announced in *Powell v. Dayton R. R. Co.*, 14 Or. 22 (12 Pac. 83), and which has been followed ever since that decision. It was said at the argument of the motion that the court below had

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refused to permit an amendment on the ground that under the mandate it had no authority so to do, but we cannot inquire into that question at this time.

OVERRULED.

Decided February 8, 1897; rehearing denied.

DUFFY v. McMAHON.

(47 Pac. 787.)

APPEAL—SUFFICIENCY OF NOTICE.—DESCRIPTION OF JUDGMENT.—A notice of appeal to the Supreme Court describing the judgment as rendered March 2, 1896, for "the sum of \$250 and interest, from May 8, 1894, amounting to the sum of — dollars," is insufficient to support an appeal from a judgment rendered March 3, 1896, for \$293 and interest thereon from that date at the rate of ten per cent. per annum: *Crawford v. Wist*, 26 Or. 596, distinguished.

From Multnomah: E. D. SHATTUCK, Judge.

Action by John F. Duffy against M. J. McMahon, and from a judgment for plaintiff the defendant attempted to appeal. Respondents now move to dismiss because the notice of appeal does not describe the judgment in this case.

DISMISSED.

Mr. Lionel R. Webster, for the motion.

Mr. Edward Mendenhall, contra.

PER CURIAM. This is a motion to dismiss an appeal. The plaintiff, on March 3, 1896, obtained a judgment in the Circuit Court for Multnomah County against the defendants for \$293.43, and interest thereon from that date at the rate of ten per cent. per annum, \$50 attorneys' fees, and the costs and disbursements of the action, from which the defendants attempted to appeal, but in the notice thereof they describe a judgment as having been given March 2, 1896, for "the sum of two hundred and fifty dollars, and interest from the 8th day of May, 1894.

amounting to the sum of \$—; for the sum of fifty dollars attorneys' fees, and for his costs and disbursements." The plaintiff, contending that the notice fails to identify the judgment complained of, moves to dismiss the appeal. The judgment rendered by the court on March 3 provides for interest at the rate of ten per cent. per annum; and, as the statute declares that "judgments and decrees for money upon contracts bearing more than six per centum interest, and not exceeding ten per centum per annum, shall bear the same interest borne by such contracts" (section 3591, Hill's Code), it must be presumed that the judgment complained of was rendered upon a contract bearing ten per cent. interest. The legal rate in this State is eight per cent. per annum on money due or to become due where there is a contract to pay interest and no rate specified (Code, § 3587), and, as the defendants in their notice of appeal described a judgment for \$250, with interest from May 8, 1894, amounting to \$286.33, it is evident there is a variance between the judgment given by the court and the one described in the notice in the following particulars: 1st. In the date of its rendition; 2d. In the amount for which the judgment was given; and 3d. In the rate of interest. This court in *Crawford v. Wist*, 26 Or. 596 (39 Pac. 218), in discussing the sufficiency of a notice of appeal, says: "The tendency of the court as indicated by recent decisions is to construe notices of appeal liberally, and hold them sufficient if by fair construction or reasonable intendment the court can say that the appeal is taken from the judgment in a particular case." Even with this very liberal rule as a guide we are unable to say, from an inspection of the notice in the case at bar, that the appeal was taken from the judgment complained of, and, this being so, the appeal will have to be dismissed, and it is so ordered.

DISMISSED.

Argued January 7: decided February 23, 1897.

OREGON COAL CO. v. COOS CO.

(47 Pac. 851.)

- 30 308
139 192
29 619
1. **QUESTIONS CONSIDERED ON WRIT OF REVIEW.**—On a writ of review the reviewing court will not, for the purpose of deciding a disputed question of fact, consider the evidence upon which the inferior tribunal acted, but will review the decision of such court or tribunal only upon the ultimate facts appearing by the record: *Poppleton v. Yamhill Co.*, 8 Or. 338; *Vincent v. Umatilla Co.*, 14 Or. 375; *Barton v. La Grande*, 17 Or. 577; and *Smith v. City of Portland*, 25 Or. 297, cited and approved.
 2. **REVIEW OF ACTION OF BOARD OF EQUALIZATION.**—Where a complaint is made by a property owner to the board of equalization that his assessment is excessive, the assessment roll as returned by the assessor fixes the value prima facie against both the board and the complainant; and, though the only testimony offered is by the complainant, the board having disagreed with his estimate of values, there is for review only a disputed question of fact, which cannot be tried in such a proceeding.

From Coos: J. C. FULLERTON, Judge.

Petition for writ of review by the Oregon Coal & Navigation Company against Coos County and the members of its board of commissioners to review the action of said board as a board of equalization in fixing the assessment of petitioners' property. The court set aside the assessment, and defendants appeal.

REVERSED.

For appellants there was a brief over the names of *S. H. Hazard* and *Geo. M. Brown*, District Attorney, with an oral argument by *Mr. Hazard*.

For respondent there was a brief over the name of *Mr. John A. Gray*, with an oral argument by *Messrs. Rufus Mallory* and *J. W. Hamilton*.

Opinion by MR. JUSTICE WOLVERTON.

This appeal is from the judgment of the Circuit Court for Coos County upon review of an order of the County Court, sitting as a board of equalization, whereby it revised the assessor's appraisal of plaintiff's taxable property. The plaintiff complained before the board that the assessor had placed a valuation upon its property upon the assessment roll largely in excess of its real or actual cash value. The only evidence produced was in behalf of plaintiff, which tended to show that the real or actual cash value of a large part of the property was much less than that fixed by the assessor upon the roll. The board reduced somewhat the assessed values, but not to the extent which it is claimed was established by the uncontradicted evidence. A transcript of all the testimony is certified up with the record.

1. In behalf of the defendants it is contended that the decision of the County Court, acting as such board, upon a question of fact is conclusive in a proceeding by writ of review. The doctrine of this state upon the subject may be summarized thus: Upon a writ of review under the statute the supervising court will not examine the evidence submitted to the inferior court or tribunal for the purpose of settling or deciding a new or disputed question of fact, but will review the decision of such court or tribunal only upon the ultimate facts appearing by the record: *Smith v. City of Portland*, 25 Or. 297 (35 Pac. 665); *Road Company v. Douglas Co.*, 5 Or. 406; S. C., second appeal, 6 Or. 299; *Poppleton v. Yamhill Co.*, 8 Or. 338; *Vincent v. Umatilla Co.*, 14 Or. 375 (12 Pac. 732); *Barton v. La Grande*, 17 Or. 577 (22 Pac. 111).

2. The plaintiff, however, without conceding the point, argues that the facts are practically admitted; that the evidence offered by it remains uncontradicted by any countervailing testimony, and should control in determining the true assessable value of plaintiff's property. In

Smith v. City of Portland, 25 Or. 297 (35 Pac. 665), the present Chief Justice said: "It is only when there is an entire absence of proof on some material fact found that the finding becomes erroneous as a matter of law," citing *Hyde v. Nelson*, 11 Mich. 353. And in *Vincent v. Umatilla Co.*, 14 Or. 375 (12 Pac. 732), the converse of the proposition is stated. STRAHAN, J., says: "When the facts are all admitted, the sole question at issue is one of law, and the writ may furnish a cheap and expeditious remedy." And the same might be said in this case if the uncontradicted evidence were such as but one conclusion could possibly be adduced therefrom. The vice of the argument is in assuming that such is the state of the record and the evidence in this proceeding. In the first place, the testimony for plaintiff is not at all uniform on the question of values; different judges might draw different conclusions from it. And, secondly, it does not stand uncontradicted, in the light in which we view the proceeding. The powers granted the board of equalization practically constitute it a board of review also (sections 2778-2781, Hill's Code), and it has constantly exercised jurisdiction as such upon the application of individuals to correct assessments touching the valuation of property; but in doing so the roll comes to it with values prima facie established: *People v. Trustees of Ogdensburgh*, 48 N. Y. 393. The assessor, in making up valuations, acts judicially; and, when established, they must remain fixed until revised by the board of equalization, or the County Court acting regularly in that capacity: *Or. & Wash. Sav. Bk. v. Jordan*, 16 Or. 116 (17 Pac. 621). So that the complainant who attacks the assessor's values has the laboring oar, and must overcome the prima facie case which the roll establishes. In *People v. Davenport*, 91 N. Y. 581, the court say: "It is essential that a party assailing the validity of an assessment should make it

conclusively appear that the method by which the assessors arrived at the result complained of was incorrect, and that the assessment does not represent the fair value of the property assessed." In *State ex rel. v. Dodge Co.*, 20 Neb. 595 (31 N. W. 117), it was held, under a statute analogous to ours, "that, upon a complaint being filed, the board of equalization, in reviewing the assessment of an individual, has appellate, special, and judicial powers; and, until evidence is received by it in support of the complaint, the taxpayer may rely upon the valuation made by the assessor." The converse of the proposition ought to be sound. If the assessor's valuation establishes a prima facie case against the board, there is no reason why it should not establish such a case against the complainant also. So, upon the whole, we have simply to look into a disputed question of fact—that is, whether plaintiff has overcome the prima facie case presented by the roll, and this we are inhibited from doing, upon a writ of review, under the settled law of this state. We presume that if a case should be presented whereby it was made manifest that the board had acted arbitrarily and capriciously, and in total disregard of the record and the evidence, it would amount to legal error: *People v. Howland*, 61 Barb. 285. But such is not the case here. The judgment of the court below will be reversed, and the cause remanded with directions to dismiss the writ.

REVERSED.

Argued November 24, 1887. Decided January 18, 1889.

GRANT v. PADDOCK

J. M. GRANT

1. **DEFENSE—FORCE OF JURY.**—In an action by a tenant against the landlord to be admitted into possession, a denial in the answer of plaintiff's title and right of entry is an answer.
2. **FORCE OF 10 YEARS OF LIMITATIONS.**—CODE §§ 4 AND 519.—In computing the time limited by section 4 of Hill's Code of Oregon, or any other action to recover possession of real property, the day on which the cause of action accrued should be excluded, and the rule prescribed by section 519 of the Code (i. e., that the time within which an act is to be done shall be computed by excluding the first day and including the last) applies to all computations of time.
3. **PRESUMPTION OF SURVIVAL.**—A conclusion of law that the share of one of several joint heirs capable of making a will descended to his share to the survivors, is not supported, in the absence of a finding that he died intestate, or that he did not leave a widow, child, or parent surviving.

From Multnomah: HARTWELL HURLEY, Judge.

Action by J. M. Grant against Benjamin O. Paddock in ejectment. From a judgment for plaintiff, defendant appeals.

MODIFIED.

For appellant there was a brief and an oral argument by Messrs. Stephen R. Harrington and W. W. Thayer.

For respondent there was a brief over the names of H. J. Bigger and Mitchell, Tanner & Mitchell, with an oral argument by Mr. Bigger and Mr. Albert H. Tanner.

Opinion by MR. CHIEF JUSTICE MOORE.

*NOTE.—The question whether the day from which time must be computed shall be included in the period of limitation is considered in the following annotated cases: *Seward v. Hayden* (Mass.), 15 Am. St. Rep. 183, 5 L. R. A. 844; *Merritt v. Mora*, 11 L. R. A. 724 (44 Fed. 369).—REPORTER.

This is an action by J. M. Grant, as tenant in common, to recover of his co-tenant the undivided one-third of the north half of the donation land claim of John A. and Nancy Williams in Multnomah County. The defendant, after denying the material allegations of the complaint, alleges, first, that one S. E. Paddock, under whom he holds possession, is the owner in fee of the whole north half of said claim; and, second, that neither the plaintiff, his ancestor, predecessor, nor grantor, was seized or possessed of the demanded premises within ten years before the commencement of this action, during which time the defendant, and those under whom he claims, have been in the open, notorious, peaceable, and quiet possession thereof, and have held the same adversely as against every one. The reply put in issue the allegations of new matter contained in the answer, and, a jury being waived, a trial was had by the court, which found, in substance, that on December 5, 1860, Nancy Williams died intestate in Multnomah County, leaving as her heirs-at-law the issue of her marriage with the said John A. Williams, her surviving husband, to wit: Sarah J. Grant, Missouri Dodd, Judith A. Bozorth, Josephine Grant, Milton B. Williams, Wiley C. Williams, and Sanford R. Williams, and the following-named grandchildren: John Henry Childs and George Shelly; that Milton B. Williams died in 1861, and Wiley C. Williams in 1863, each being then under age, unmarried, and without issue, and that said John Henry Childs died after April 30, 1884; that at the time of her death the said Nancy Williams was seized in fee of the north half of said donation land claim; that on June 10, 1863, John A. Williams, having a life estate only in said premises, as tenant by the courtesy, executed to one Henry Holtgreve a general warranty deed, purporting and intending thereby to convey in fee the whole of said north half; that on May 1, 1865, Holtgreve and his wife

executed a deed for said premises to one John Switzler, and he to J. C. Files in 1876, who, with his wife, on March 14 of that year, executed to the defendant's lessor a deed purporting to convey the same to him, his heirs and assigns. The court also found that each of said grantees, on obtaining his deed, entered into possession of this land, and continued to occupy, use, and cultivate the same as a farm until he executed a deed thereto and surrendered the possession thereof to his grantee; and that their possession had been open, continuous, adverse, and hostile to all other persons, and under a claim of title to the whole of said real property, and that from March 1, 1876, to the commencement of this action, defendant's father, Sylvester E. Paddock, by himself and his tenants, has continued to occupy and use the said premises, and was then in the possession thereof; that John A. Williams died on the 30th day of April, 1884, between 12 o'clock midnight and 2 o'clock of that morning, and that the summons in this action was not delivered to the sheriff of Multnomah County for service until April 30, 1894, after 8 o'clock A. M.; that Judith A. Bozorth died intestate November 29, 1892, leaving three sons, named J. O., M. B., and Scott Bozorth; that on April 18, 1894, said Sarah J. Grant and Josephine Grant executed to the plaintiff a deed purporting to convey an undivided two-sixths of said premises.

And the court also found, as conclusions of law, that upon the death of Nancy Williams the real property of which she died seized descended to her heirs in equal shares, and that the shares of Milton B. and Wiley C. Williams descended in equal shares to the children of Nancy Williams, and that the share of John Henry Childs therein descended, upon his death subsequent to the death of John A. Williams, to the other remaining heirs of Nancy Williams; that the statute of limitations did not begin

to run against the heirs of Nancy Williams, as to the north half of said claim, until the death of John A. Williams; that the plaintiff's right of action was not barred; that plaintiff was the owner in fee and entitled to the possession of the undivided one-third of the north half of said claim, and that the defendant wrongfully withholds the possession thereof to the plaintiff's damage in the sum of \$1; and upon these findings gave judgment for the plaintiff, from which the defendant appeals.

1. It is contended by counsel for the defendant that, an issue having been joined upon the allegation that plaintiff was the owner in fee of an estate in the demanded premises as tenant in common with the defendant, upon which the court failed to find an ouster of the plaintiff or a refusal of the defendant to admit him into possession, it follows that there is no foundation to support the judgment, for which reason it should be reversed. While proof of a denial of the plaintiff's right of possession, or some act equivalent thereto, is essential to the maintenance of an action of ejectment by a tenant in common of real property against a co-tenant (Hill's Code, § 327), yet the condition of the pleadings may be such as to concede this fact, and thus dispense with such proof: Freeman on Cotenancy and Partition (2d Ed.), § 292. In *Miller v. Myles*, 46 Cal. 535, the court, in discussing this proposition, say: "It is well settled that a refusal, after a proper demand, by a tenant in common in possession to admit his co-tenant into the possession, is itself an ouster, and dispenses with the necessity of further proof on that point. It is equally clear that in an action by a tenant in common against his co-tenant to be admitted into the possession, a denial in the answer of the plaintiff's title and right of entry is equivalent to an ouster." The answer herein having alleged adverse possession for more than ten years as a defense to the action, was clearly a denial of the

plaintiff's right, and, having found an adverse holding for less than ten years upon the issue joined upon said allegation, necessarily found an ouster of plaintiff: *Harrison v. Taylor*, 33 Mo. 211 (82 Am. Dec. 159); *Noble v. McFarland*, 51 Ill. 226; *Clason v. Rankin*, 1 Duer, 337; *Petersen v. Laik*, 24 Mo. 541 (69 Am. Dec. 441); *Spect v. Gregg*, 51 Cal. 198.

2. The court having found that John A. Williams died April 30, 1884, between the hours of 12 and 2 o'clock in the morning, and that this action was not commenced until after 8 o'clock in the morning of the 30th of April, 1894, counsel for the defendant contend that their client and those under whom he claims have been in the adverse possession of the premises more than ten years, and, as the statute declares that no action shall be maintained for the recovery of real property or for the possession thereof unless it appears that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the premises in question within ten years before the commencement of such action (Hill's Code, § 4), the conclusion of law that the plaintiff's right of action is not barred by the statute of limitation is not deducible from, but is contradicted by, the findings of fact; that the prohibitory statute above cited cannot be modified by the general rule adopted by the courts to the effect that the time within which an act is to be done shall be computed by excluding the first day and including the last; and that the provisions contained in section 519. Hill's Code, applies only to cases in which the time is expressed in days. In support of the proposition that a statute prescribing the mode for computing time does not apply to divisions thereof expressed by years, counsel for appellant cite and rely upon the doctrine announced in the cases of *Williams v. Lane*, 87 Wis. 152; and *Aultman v. Syme*, 91 Hun. 632 36 N. Y. Sup. 528. The first case

was an action to foreclose a mechanics' lien, instituted under a statute which required it to be brought within one year from a given date, but the day on which the year terminated having fallen on Sunday, the action was not commenced until the next day, and it was held that the cause of action was barred. "The case," said PINNEY, J., "is not within the statute (S. & B. Ann. Stats., § 4971), which applies only to cases when the time in the statute 'is expressed in days,' and is not controlled by *Buckstaff v. Hanville*, 14 Wis. 77." Subdivision 24 of the section of the statute cited in that case declares: "The time within which an act is to be done as provided by any statute, when expressed in days, shall be computed by excluding the first day and including the last, except that if the last day be Sunday, it shall be excluded." It will thus be seen that if the statute had not limited the method of computing time to cases in which it was expressed in days, the rule would have applied as well to cases in which the time was expressed in years. In the second case, the court reach a similar conclusion, and say: "It seems to us, upon an examination of the statutes in respect to the computation of time, that a different rule prevails in computing any specified number of days, weeks, or months from a specified event, from that which obtains in the computation of any specified number of years from a specified event. By the provisions of the statutes, the day from which any specified number of days, weeks, or months of time is reckoned, shall be excluded in making the reckoning: Laws 1894, c. 447, § 27. But the section relating to computation of time by the year contains no such provision: Laws 1892, c. 677, § 25." Section 27 of the act of 1894, supra, declares: "In computing any specified number of days, weeks, or months from a specified event, the day upon which the event happens is deemed the day from which the reckoning is made. The day from

which any specified number of days, weeks, or months of time is reckoned shall be excluded in making the reckoning." It will be observed from an inspection of this statute that the method of computing time by excluding the day upon which a certain event happened is limited to divisions thereof to be measured by days, weeks, or months, and under the maxim of *expressio unius est exclusio alterior*, the rule could not be applied to computing time expressed in years.

In *Spencer v. Haug*, 45 Minn. 731 (47 N. W. 794), the Supreme Court of Minnesota, in construing a statute which provided that "the time within which an act is to be done shall be computed by excluding the first day and including the last. If the last day is Sunday, it shall be excluded," held that this section applied as well to the construction of a statute as to matters of practice, and that ten years from May 19, 1862, extended to and included May 20, 1872, the preceding day having been Sunday. So, too, in *Cowan v. Donaldson*, 95 Tenn. 327 (32 S. W. 457), the Supreme Court of Tennessee, in a suit to revive a decree, say: "Decree having been rendered November 20, 1883, a suit upon it is in time if brought November 20, 1893, under section 46, Mill. & V. Code, which provides that the time within which any act is to be done shall be computed by excluding the first and including the last day." We conclude, therefore, that where the statute prescribing the method of computing time does not limit its application to any specified period, it applies to all divisions of time. Whether the day of the happening of a certain event should be included as a basis from which to compute time has been a vexed question for many centuries, and in consequence of a spirited controversy as to whether it should be included or excluded, and to remove any doubt upon the subject, Gregory IX, in his decretals, introduced the phrase "a year and a day,"

thus including the first and last day of the term: *Griffith v. Bogert*, 59 U. S. (18 How.) 158. In the absence of any statute regulating the matter, the rule seems to be that the day upon which the particular event happened should be excluded from the computation of time, when by doing so courts are enabled to construe the provisions of a statute or the stipulations of a contract in such a manner as to prevent penalties and forfeitures, and to uphold bona fide transactions: *Seward v. Hayden*, 150 Mass. 158 (15 Am. St. Rep. 183, 5 L. R. A. 844, 22 N. E. 629); *Merritt v. Mora*, 44 Fed. 369 (11 L. R. A. 724); *Smith v. Dickey*, 74 Tex. 61 (11 S. W. 1049); Endlich's Interpretations of the Statutes, § 390. "In the computation of time," says O'NEAL, J., in *State v. Schnierle*, 5 Rich. Law, 299, "the day from which the reckoning commences and that on which it terminates may both be included or excluded as will best preserve a right or prevent a forfeiture." But rules adopted by the courts for the computation of time can have no application to the method prescribed by statute, except to apply the reasons upon which such rules are predicated to the construction of statutes in doubtful cases. One June 1, 1863, the Code of Civil Procedure, including sections 4 and 519, Hill's Code, went into effect; and, as these sections formed part of one general act, they ought to be so construed as to harmonize their apparent discrepancies, and to give effect, as far as possible, to the provisions of each: Endlich's Interpretations of the Statutes, § 43; *Holgate v. Oregon Pacific R. R. Co.*, 16 Or. 123 (17 Pac. 859); *Smith v. Kelly*, 24 Or. 464 (33 Pac. 642). Construing these sections in *pari materia*, and in such manner as to avoid a forfeiture of the estate involved, it is evident that section 4, Hill's Code, *supra*, should be so construed as to exclude the day on which the plaintiff's grantors, by the death of their father, became entitled to the possession of the prem-

ises, and that, excluding such day, it appears that this action was commenced within ten years from the time the plaintiff's grantors were seized in law of an estate in the north half of the John A. Williams donation land claim.

3. The court having found that Nancy Williams, upon her death intestate, left surviving her four daughters, three sons, and two grandsons, the latter being the issue of two of her married daughters then deceased, and that Milton B. Williams and Wiley C. Williams, two of these sons, having thereafter died under age without having been married, also found as a conclusion of law that upon the death of these sons the share of each in the real property inherited from his mother descended in equal shares to the children of Nancy Williams. This conclusion of law would seem to limit an inheritance to the brother and sisters, to the exclusion of the grandchildren, John Henry Childs and George Shelly, who, under subdivision 6 of section 3098, Hill's Code (see Statutes of Oregon 1855. p. 380), inherited by right of representation an equal share with the children of Nancy Williams, but in the judgment rendered the court seems to have rectified the error in the conclusions of law, by treating these grandsons as heirs-at-law of Milton B. and Wiley C. Williams. The court also found that John Henry Childs, one of said grandsons, died after April 30, 1884, and as a conclusion of law therefrom found that upon his death his interest in said land claim descended to the remaining heirs of Nancy Williams, and, predicated upon this conclusion, awarded plaintiff the undivided two-sixths of the real property in question. The court found that the mother of John Henry Childs died in 1852, hence he was above the age of twenty-one years, and was therefore capable of executing a will; but the court does not find that he died intestate, or that he did not leave surviving him a widow, child, or father, and, this

being so, the findings of fact do not support the conclusions of law that the share of this person descended to the remaining heirs of Nancy Williams, and for this reason the judgment must be modified. The cause will, therefore, be remanded with directions to amend the conclusions of law to the effect that the five surviving children and the two grandsons of Nancy Williams each inherited an undivided one-seventh of the real property of which the intestate died seized, and to give judgment that the plaintiff is the owner in fee and entitled to the possession of the undivided two-sevenths of the north half of the donation land claim of John A. and Nancy Williams, in Multnomah County, for \$1 damages, and the costs and disbursements of this action in the court below, the defendant to recover his costs in this court.

MODIFIED.

Argued December 7, 1896: decided February 15, 1897.

INMAN v. SPRAGUE.

(47 Pac. 826.)

GENERAL ASSIGNMENTS—PREFERENCES TO CREDITORS.—Section 3173 of Hill's Code, declaring that no general assignment by an insolvent for his creditors shall be valid unless made for the benefit of all the creditors, is intended to entirely destroy all such assignments with preferences, but its operation is confined to general assignments, and it does not limit or affect the right of a failing or insolvent debtor to pay or secure certain creditors with part of or all his property.

FRAUDULENT CONVEYANCES—PREFERENCES IN ASSIGNMENTS.—In cases where several conveyances are executed about the same time, and it is sought to have them considered together as forming a general assignment, the guiding principle is the actual intention of the parties; and if the instrument which is claimed to create an illegal preference was given and received in good faith, to secure or pay a genuine debt, and not as a part of an attempt to evade the prohibition against preferences, it will be sustained, however near in point of time it may be to a subsequently executed general assignment.

From Multnomah: LOYAL B. STEARNS, Judge.

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32	203
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36	572
30	321
41	204

Suit by Inman, Poulsen & Co. (a corporation) against E. J. Sprague and wife, John Myers, their assignee, the Commercial & Savings Bank, and the Portland Lumbering & Mfg Co., to have certain instruments cancelled, as constituting a general assignment for creditors with preferences. There was a decree for defendants, and plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the name of *George, Gregory & Duniway*, with an oral argument by *Mr. Ralph R. Duniway*.

For respondents there was a brief and an oral argument by *Mr. Samuel H. Gruber*.

Opinion by MR. JUSTICE BEAN.

On January 23, 1894, the plaintiff commenced an action at law against the defendants E. J. Sprague and wife, and caused all their property, consisting of certain real estate in the City of Portland, to be attached. Thereafter, and on the 25th of the same month, the Spragues mortgaged the attached property to the defendant bank to secure the payment of a promissory note for \$400, then long overdue, and which they had repeatedly promised to secure. On the 30th of January they gave another mortgage to the defendant the Portland Lumbering & Manufacturing Company, to secure an indebtedness of \$105 due the company, and \$400 due their son, Charles S. Sprague, and on the 31st of January made a general assignment for the benefit of creditors to the defendant John Myers. Both the mortgages referred to were accepted by the mortgagees in good faith, to secure bona fide existing debts, and without any knowledge of plaintiff's attachment, or of any intention on the part of the

Spragues to make a general assignment for the benefit of creditors. The assignee immediately qualified, and, having entered upon the discharge of his duties, the plaintiff, on May 3, 1894, presented to him for allowance as a claim against the estate of his assignors a duly certified copy of its judgment recovered in the action at law referred to. Thereafter the assignee made his report of the claims filed against the estate, including that of plaintiff, and applied for and obtained an order authorizing him to pay certain expenses incurred in the management of the estate and continued to discharge the duties of his office until November 1, 1894, when the plaintiff commenced this suit to have the mortgages and assignment set aside, on the ground that the same were fraudulent and void as to creditors. The debtors Sprague, the assignee Myers, and the mortgagees, the bank and lumbering company, were all made parties to the suit. Answers were filed, and, on the proof taken, the court held that although no fraud was proven the mortgages and assignments must in law be deemed parts of the same transaction, and, construed as one instrument; that the assignment is void as creating a preference, but that plaintiff is estopped by its conduct from maintaining this suit. From this decree it has appealed.

From the statement of facts it will be observed that the questions presented by the record are, whether the assignment from the Spragues to the defendant Myers is void as creating an illegal preference, and, if so, whether the plaintiff is estopped by its conduct from insisting upon such invalidity. It is claimed that the assignment is void under section 3173, Hill's Code, which provides that "no general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors, shall be valid unless made for the benefit of all his creditors in proportion to the amount of their respective

claims." Standing by itself, the assignment is unobjectionable; it is in the usual form, and purports to transfer all the property of the assignors for the benefit of all their creditors in proportion to their respective claims. But the contention for the plaintiff is that the assignment and mortgages to the bank and lumbering company were but parts of one and the same transaction, and in law form but one instrument, and are, therefore, taken together, in effect, a general assignment with preferences, and within the denunciation of the statute. Unless this position can be sustained from the evidence, the plaintiff's case must fail, for there is nothing in the statute which prohibits a debtor in failing circumstances from preferring one creditor to another, unless it is done in contemplation of and as part of a general assignment. At common law a debtor could lawfully make an assignment with preferences in favor of certain creditors, and it was to cut this doctrine up by the roots that the statute was passed. But it does not undertake to limit or affect the right of an insolvent debtor to sell or mortgage his property to one or more of his general creditors, even to the exclusion of all the others. Its operation is limited to the matter of general assignments, and the preferences against which it is directed must be contained either in the assignment itself or in some other instrument forming in law a part thereof: Burrill on Assignments, § 167. As said by the Supreme Court of Iowa, in construing a similar statute, it "does not limit or affect the right of an insolvent debtor, or one contemplating insolvency, or, indeed, any other, to sell or mortgage a part or all of his property to one or more of his many creditors, in payment or security of a particular debt or debts. And this is true, although such sale or mortgage may, practically, defeat all other creditors than the grantee from collecting their demands. Nor does the statute prohibit or interfere with

the right of any debtor, as it existed prior to the statute, to make a partial assignment. In other words, the statute does not, expressly or by implication, extend any further or apply to any instrument or conveyance other than to a general assignment. And, therefore, it is still competent for any debtor to pay a part of his creditors in full; to secure another part by mortgage, or deed of trust, upon a part of his property; to make a partial assignment of still other property for the benefit of certain other creditors, with or without preference, and afterwards to make a general assignment. The statute simply provides that such general assignment shall not be valid, unless it is made for the benefit of all the creditors pro rata": *Lampson v. Arnold*, 19 Iowa, 479.

The rule, however, is well established that several instruments, executed at or about the same time and forming part of the same transaction, will be considered together and as one instrument, and if, when so construed, they have the effect of a general assignment with preferences, they come within the terms of the statute, and are void: *Burrows v. Lehndorff*, 8 Iowa, 96; *Cole v. Dealham*, 13 Iowa, 551; *Van Patten v. Burr*, 52 Iowa, 518 (3 N. W. 524). But, although several instruments may in fact be executed at or about the same time, they do not necessarily form one transaction, nor must they necessarily be construed as one instrument. Whether they do or not depends upon the character of the instruments, the circumstances of the case, and the intent of the parties; in other words, it is a question of fact to be determined from the evidence, like any other fact in the case. Upon this point the case of *Van Patten v. Burr* is peculiarly instructive. In that case an insolvent debtor executed two chattel mortgages and an assignment, all bearing the same date. A suit by an attaching creditor to set the mortgages and assignments aside first came

before the supreme court on a demurrer to the petition, which alleged that the debtor, "in contemplation of insolvency, and being then insolvent, made, executed, and delivered, in writing, a general assignment of his property for the benefit of his creditors contained in three instruments executed by him," and "that said instruments were intended and do constitute, as a whole, a general assignment of his property for the benefit of creditors." And it was held that under such allegations the three instruments constituted but one transaction, and together made a general assignment for the benefit of creditors with preferences, and was void under the statute. The case was remanded for trial, and again came before the court on the merits, when it was held that one of the mortgages was good because it appeared that it had been taken and accepted by the mortgagee without knowledge of the contemplated assignment: *Van Patten v. Burr*, 55 Iowa, 224 (7 N. W. 522). And in *Perry v. Vezina*, 63 Iowa, 25 (18 N. W. 657), a chattel mortgage executed three hours before a general assignment was held not to invalidate the assignment, it appearing that the debtor did not contemplate making it when the mortgage was made. Indeed, in all cases of this character, the true guiding principle of the decision is the intention of the parties. If the instrument giving a preference is executed and received in good faith, with the intention of paying or securing a bona fide debt, and not as a part of a general assignment under the statute, it is valid, however near its execution may be in point of time to a subsequently executed assignment. But when an insolvent debtor has formed the determination to voluntarily dispose of all his property for the benefit of his creditors, and has entered upon the performance of that determination, the number or character of the instruments used by him to accomplish his purpose is wholly immaterial. The law

will regard all his acts having for their object the accomplishment of this purpose as parts of one single transaction, and will read into the assignment, when executed, all prior acts of the debtor having reference to the disposition of his property, and if any preferences are shown to have been given by him to one creditor over another, the assignment will be declared void under the statute: *Nelson v. Garey*, 15 Neb. 531 (19 N. W. 630); *Preston v. Spaulding*, 120 Ill. 208 (10 N. E. 903); *Benham v. Ham*, 5 Wash. 128 (34 Am. St. Rep. 851, 31 Pac. 459); *Root v. Potter*, 59 Mich. 506 (26 N. W. 682); *Root v. Harl*, 62 Mich. 420 (29 N. W. 29); *Burnham v. Haskins*, 79 Mich. 35 (44 N. W. 341); *South Branch Lumber Co. v. Ott*, 142 U. S. 622 (12 Sup. Ct. 318); *Perry v. Holden*, 22 Pick. 269.

Within these principles of law, the solution of this case is not at all difficult. There is not a scintilla of evidence in the record to show that the Spragues contemplated making a general assignment at the time either of the mortgages referred to were executed. Indeed, the inference from the testimony is that the intention to do so was not formed until after an unsuccessful attempt on the day of its execution to borrow the money with which to pay the plaintiff's claim. And, further, it is stipulated that the lumbering company, at the time it accepted the mortgage, had no knowledge of any intention on the part of the Spragues to make an assignment for the benefit of creditors, if such an intention existed, and no actual knowledge of plaintiff's attachment, and the undisputed testimony in reference to the bank's mortgage is to the same effect. Both mortgages were received by the mortgagees in good faith, in the usual and ordinary course of business, to secure an existing indebtedness, and under the testimony and the law as we understand it cannot be taken as parts of the subsequently executed assignment. It follows that the decree of the court below must be

affirmed, without considering the question of estoppel, and it is so ordered.

AFFIRMED.

Argued December 8, 1896; decided February 23, 1897.

OREGON POTTERY CO. v. KERN.

(47 Pac. 917.)

30	328
133	329
30	328
306	192
36	219
36	552
30	328
38	300
30	328
42	234

CROSS EXAMINATION—CODE, § 837.—A witness who has testified on direct examination that the scow, the condition of which at the time it sank is in issue, was built by a certain person and was in good condition at the time it was delivered to defendant, may be asked on cross examination if he knew the builder before he built the scow, and whether he ever knew or heard of the scow being sunk before it was finally sunk in defendant's service, in view of section 837, Hill's Code, permitting an adverse party to cross examine a witness as to any matter stated in his direct examination, or connected therewith: *Maxwell v. Bolles*, 28 Or. 1, cited and applied.

IDEM.—In an action for damages for the loss of a scow, where a witness has testified that he calked the scow just before its delivery to defendant, and that it was then in good condition and worth a certain sum, defendant may, on cross examination, ask: "Did you ever know anything about that scow before you were called to repair it? Did you ever examine it?" for the purpose of showing the means of knowledge and extent of information of the witness on the question of value.

OPINION EVIDENCE.—The fact that a witness has had his attention called to scows, and has heard men accustomed to buying and handling such property discuss their value, does not render him competent to give an opinion of the value of a scow in controversy, where it is not shown that he ever saw the property in question, nor was even familiar with the market value of such articles, or knew anything about the cost or manner of their construction. Opinion evidence may in some cases be received, but it must first be made to appear that the witness has had the means of forming an intelligent opinion derived from an adequate knowledge of the nature and kind of property under consideration, and of its value.

From Multnomah: E. D. SHATTUCK, Judge.

Action by the Oregon Pottery Company against Daniel Kern. From a judgment in favor of plaintiff, defendant appeals.

REVERSED.

For appellant there was a brief over the name of *Bronaugh, McArthur, Fenton & Bronaugh*, with an oral argument by *Mr. Earl C. Bronaugh*.

For respondent there was a brief over the name of *Cleland & Cleland*, with an oral argument by *Mr. John B. Cleland*.

Opinion by MR. JUSTICE BEAN.

This is an appeal from a judgment in favor of plaintiff, rendered in an action brought to recover the value of a scow leased to the defendant, and lost while being used by him. The complaint avers that the loss occurred through the negligence and carelessness of the defendant and his employes, while the defense is that it was due to defective construction, by reason of which the scow was unfit for the uses for which it was hired. On the trial, A. M. Smith, vice-president and manager of plaintiff, was called as a witness, and testified in its behalf, among other things, that the scow in question was built for plaintiff in 1891 by one Silas Smith; that it was built in a good and workmanlike manner, and was used by the plaintiff during the years 1891, 1892, and 1893, in carrying clay from Lewis and Clark River to Portland; that in June, 1894, it was leased to the defendant in good condition, and, while being used by him, was sunk in the Columbia River and lost. On cross examination the defendant's counsel put to the witness the following questions: "Who is Silas Smith? Did you ever know him before he built this scow?" and, "Did you ever know or hear of that scow being sunk in your service or in anybody else's service before she finally sunk in defendant's service?" but the court refused to permit the witness to answer either of these questions, on the ground that they were not

proper cross examination, and such refusal is assigned as one of the errors on this appeal. For the purpose of showing that the scow was in good condition at the time it was delivered to the defendant, one J. F. Steffen was called as a witness for plaintiff, and testified in chief, among other things, that he was a shipbuilder by occupation, and had been for twenty-two years; that he knew the scow in question, and was employed to and did calk her about the first of June, 1894; that she was then in good condition, about four years old, and worth about \$2,500. On cross examination he was asked: "Did you ever know anything about that scow before you were called to repair it? Did you ever examine it before?" To this question the plaintiff by its counsel objected on the ground that it was not proper cross examination, which objection was sustained, and this is also assigned as error. For the purpose of proving the value of the property in question, the plaintiff called one Blaine R. Smith, who, after testifying that he had been acquainted with the business of the plaintiff since 1891, and that his attention had been called to the scows used on the river, and that he had heard men accustomed to buying, owning, and handling such property, from 1891 down to the time of the trial, discuss the price of scows, was asked by counsel for plaintiff: "What, in your judgment, was this particular scow worth in the summer and fall of 1894?" An objection to this question on the ground that the qualification of the witness to give an opinion as to the value of the scow had not been shown, being overruled, the witness answered: "Well, I consider it worth about \$2,800 to \$5,000—probably \$3,000." And this ruling is also assigned as error.

The first two assignments of error relate to the rulings of the trial court in the matter of the cross examination of the witnesses Smith and Steffen. Under section 837

of our Code, an adverse party has the right to cross examine a witness as to any matter stated in his direct examination or connected therewith. This is a substantial right, of which he cannot be deprived, nor can it be restricted so as to prevent his going fully into all matters connected with the examination in chief: *Ah Doon v. Smith*, 25 Or. 89 (34 Pac. 1093); *Sayres v. Allen*, 25 Or. 211 (35 Pac. 254); *Maxwell v. Bolles*, 28 Or. 1 (41 Pac. 661). Within the limitations indicated, a free range should always be allowed in conducting the cross examination. And, as said in *Ah Doon v. Smith*, it should not be limited to the exact facts stated on the direct examination, but may extend to other matters which tend to limit, explain, or qualify them, or to rebut or modify any inference resulting therefrom, provided they are directly connected with the matter stated in the direct examination." Under this rule, the defendant had a clear right to put to both Smith and Steffen on cross examination any questions calculated to test the means and extent of their knowledge as to the condition, structure, and workmanship of the scow in question. Smith testified, on his direct examination, that it was built in 1891, in a good and workmanlike manner, by Silas Smith, and that it was in good condition at the time it was delivered to the defendant in June, 1894. This was material testimony in the case, and it would seem that the defendant ought to have been permitted on cross examination to show who the builder was, whether he was skilled or experienced as a scow builder, to what use the scow had been put by the plaintiff or by any other person to whom it had been rented, whether it had ever been sunk before, and, in fact, any matter within the knowledge of the witness bearing upon the original construction of the boat, or its condition when hired by his company to the defendant.

Steffen testified, on direct examination, that he

called the scow in June, 1894, and it was then in good condition, and worth \$2,500. But the weight and value of his testimony would depend upon the extent of his knowledge as to the quality and quantity of the material out of which it was constructed, and the method and sufficiency of the way in which it was put together. Inquiry as to such knowledge, and whether he had ever examined it before was calculated to show the means and extent of his information in this regard, and was, therefore, within the limits of a proper cross examination. But, in view of the rule that the range and extent of such an examination is not subject to appellate review, except in case of an abuse of discretion, we should probably hesitate to reverse the case on this point alone, although we are unable to very clearly see, from the record before us, the ground upon which the court below put its ruling. But, however this may be, we are clear the judgment must be reversed upon the other assignment of error.

The value of the scow was a material question in the case. The plaintiff claimed and alleged it to be worth at the time of its loss \$3,000, while the defendant denied that it was of any greater value than \$800. As evidence on this question, the witness Blaine R. Smith was permitted, over defendant's objection, to give his opinion as to its value, without showing that he was possessed of sufficient knowledge to entitle him to do so. The value of property of this kind may be established by the opinion of witnesses who first show that they are qualified to give an opinion. This is one of the admitted exceptions to the general rule prohibiting a witness from testifying as to his opinions upon a given subject. But before he is permitted to give such testimony it must be made to appear that he "has had the means to form an intelligent opinion derived from an adequate knowledge of the nature and kind of property in controversy and of its value":

Whitney v. City of Boston, 98 Mass. 312; *Haight v. Kimbark*, 51 Iowa, 13 (50 N. W. 577). Now, it does not appear that the witness Smith had any knowledge of the kind of property in question, or of its value, except what was derived from hearing others discuss the price of scows in some general way. It is true, he says his attention had been called to scows used on the river, and that he had heard men accustomed to buying, owning, and handling such property discuss their value, but this is not sufficient to render him competent to give an opinion of the value of the particular scow in question. Its value depends upon its intrinsic properties and the state of the market, and it nowhere appears that the witness had any knowledge whatever upon either of these questions. Indeed, it does not appear that he ever saw or knew anything about the scow in controversy. It is therefore clear that he was not competent to give an opinion upon the question of value. Before he could be permitted to do so it must be shown that he possessed some special knowledge on the subject, and because no such showing was made it was error to admit his testimony. The judgment of the court below is reversed, and a new trial ordered.

REVERSED.

Argued December 10, 1896; decided March 1, 1897.

GRADY v. DUNDON.

(47 Pac. 915.)

HIGHWAYS—JURISDICTION OF COUNTY COURTS.—In Oregon, county courts are of inferior and limited jurisdiction in the matter of laying out and establishing roads, but the same intendments obtain in favor of the regularity of their proceedings as prevail in courts of general jurisdiction, when the record shows that jurisdiction has been obtained of the particular subject and of the parties interested in locating and establishing the road: *State v. Myers*, 20 Or. 442, cited and applied.

ESTABLISHING PUBLIC HIGHWAYS—NOTICE IS JURISDICTIONAL—CODE.
 § 4063.—The legislature can prescribe the necessity and manner

90	888
85	604
30	333
138	449
90	888
43	286
30	333
47	245

of taking private property for public use, but somewhere in the course of the proceeding there must be a notice to the owner of the property affected, otherwise the taking will be without "due process of law"; so, an order of a county court establishing a county road, made without the notice required by section 4063, Hill's Code, is entirely void for lack of jurisdiction.

JURISDICTIONAL DEFECT—CURATIVE ACT.—The act of October 29, 1870 (Laws 1870, p. 67), curing defects in proceedings for laying out and establishing highways, does not make valid any proceeding of that kind that was originally void through want of notice; for, while the legislature may cure irregularities, it cannot make good retrospectively what it had no power to originally authorize.

ADVERSE USER—COUNTY ROAD.—The uninterrupted obstruction of a county road for more than ten years bars the rights of the public by adverse possession, though on a few occasions persons have been permitted to drive across the premises.

From Lincoln: J. C. FULLERTON, Judge.

Suit to enjoin a threatened trespass on plaintiff's property under the pretense that the point of ingress was in a county road. There was a decree for defendants, and plaintiff appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Walter S. Hufford*.

For respondents there was a brief and an oral argument by *Mr. James K. Weatherford*.

Opinion by MR. CHIEF JUSTICE MOORE.

This is a suit by Catherine M. Grady against Alonzo Dundon as road supervisor, D. P. Blue as county judge, and M. L. Trapp and J. O. Stearns as county commissioners, of Lincoln County, Oregon, to enjoin a threatened trespass. The plaintiff alleges that she is the owner in fee, and for more than ten years prior to the commencement of this suit has been in the peaceable, open, and exclusive possession of a tract of land about fifty feet in width and seventy feet in length, lying south of

and between the Oregon Pacific Railroad Company's right of way and Depot Slough, in the town of Toledo, upon which there have been erected a store and a butcher shop; that the defendants, wrongfully claiming that a county road had been laid out and established across said real property, are threatening to, and, unless restrained, will, tear down and remove said buildings, and open the pretended highway, to her irreparable injury; and prays that the threatened trespass may be permanently enjoined. The defendants, after denying the material allegations of the complaint, allege that at its regular term in May, 1867, the County Court of Benton County, which at that time had jurisdiction over the territory now included within the borders of Lincoln County, upon a petition therefor signed by twelve householders, appointed viewers and a surveyor, who viewed and surveyed a county road from a stake at the mouth of Depot Slough to a point intersecting another county road, and, having made a report thereof, the court thereafter at its said term made an order establishing a county road across said premises, in pursuance of which the road supervisor opened the same, and that it had been continuously used thereafter as a public highway until 1890, when the plaintiff, without any license therefor, obstructed the same with the said buildings; that John Graham, the plaintiff's father and grantor, was the owner of the premises in question when said proceedings were had; that he was one of the petitioners for the road, and present at and assisted in its location, and from that time until his death, in 1883, he at all times recognized it as a duly established highway, and that the plaintiff obtained her title to the said premises with notice of its location thereon. The reply having put in issue the allegations of new matter contained in the answer, the cause was referred to E. O. Potter, Esq., who took and reported the evidence, from

which it appears that the defendant introduced, over the plaintiff's objection, a copy of the order of the County Court of Benton County, which recites that the viewers and surveyor had viewed and surveyed a road as prayed for in the petition, and that, no remonstrance having been filed or claims for damages presented, it was ordered that the road so surveyed be declared a public highway, and the road supervisor was ordered to open the same; but there is no finding, nor does it otherwise appear from the record, that any notice was given of an intention to apply for the location of said road. The referee having found for the defendants, the court affirmed his report, and dismissed the suit, from which decree the plaintiff appeals.

Counsel for plaintiff contends that, the defendants having attempted to justify the threatened injury by alleging the existence of a public highway across the premises in question, the burden of proof was upon them to show that the road had been legally laid out, established, and opened; while counsel for the defendants maintain that the road was viewed, surveyed, and recorded after July 1, 1866, and that under the act of the legislative assembly, approved October 29, 1870 (Laws 1870, p. 67), all irregularities in the proceedings were thereby validated. In *Cameron v. Wasco County*, 27 Or. at page 321 (41 Pac. 160), it is said: "In the matter of laying out and establishing roads, County Courts are of inferior and limited jurisdiction: *Thompson v. Multnomah County*, 2 Or. 34; *Johns v. Marion County*, 4 Or. 46; *State v. Officer*, 4 Or. 180; *Canyonville Road Company v. Douglas County*, 5 Or. 284; but when the record of their proceedings shows that jurisdiction has been obtained of the subject-matter and of the parties interested in locating and establishing a county road, the same intendments obtain in favor of the regularity of their proceedings as prevail in courts of

general jurisdiction: *State v. Myers*, 20 Or. 442 (26 Pac. 307); *Bewley v. Graves*, 17 Or. 274 (20 Pac. 322)."

The record offered in evidence failing to show that any notice whatever was given of the intention of the petitioners to apply to the County Court for the location and establishment of a county road across the premises in question, it cannot be said that jurisdiction was obtained to make the order upon the validity of which the defendants rely (*Latimer v. Tillamook County*, 22 Or. 291, 29 Pac. 734); for the law then and now in force provides that "when any petition shall be presented for the action of the County Court for laying out, alteration, or vacation of any county road, it shall be accompanied by satisfactory proof that notice has been given by advertisement, posted at the place of holding County Court, and also in three public places in the vicinity of said road or proposed road, thirty days previous to the presentation of said petition to the County Court, notifying all persons concerned that application will be made to the said County Court at the next session for laying out, altering, or vacating such road, as the case may be": Hill's Code, § 4063. The power to appropriate private property to public use is derived from the legislative assembly, which may prescribe the mode of its exercise, and must provide a judicial tribunal for the determination of certain facts as a prerequisite to the exercise of such power (2 Kent's Commentaries, 340), but the legislative assembly cannot dispense with notice of some kind to the owner of the property affected by the location of a public highway, for to do so would be a violation of the fourteenth amendment of the federal constitution, and tantamount to the deprivation of property without "due process of law."

The question is, therefore, presented whether the legislative assembly can by an act give life to a judicial proceeding which was void for want of jurisdiction. Mr.

Endlich, in his work on Interpretation of Statutes, § 291, in discussing this subject, says: "It is a proposition too well settled by authority to admit of dispute, or call for extended discussion, that curative acts, especially upon matters of public concern, are to be allowed the retroactive effect they are clearly intended to have, even though vested rights and decisions of courts be set aside by them, so long as they do not undertake to infuse life into proceedings utterly void for want of jurisdiction." The rule seems to be well settled that the legislative assembly may, by a subsequent act, validate a departure from a prescribed procedure when it could have adopted such a course in the first instance, but it cannot make good retrospectively acts which it had no power to permit or sanction in advance (Cooley on Constitutional Limitations, 382; *Pryor v. Downey*, 50 Cal. 388, 19 Am. Rep. 656); and hence it cannot by a subsequent act give life to any judicial proceeding that was void for want of jurisdiction over the parties: *Israel v. Arthur*, 7 Colo. 5 (1 Pac. 438); *Lane v. Nelson*, 79 Pa. St. 407; *Richards v. Rote*, 68 Pa. St. 248. Without notice of some kind, the County Court can obtain no jurisdiction of the person of the owner of real property in condemnation proceedings, and any order or judgment rendered without notice must necessarily be void, and, as the legislative assembly cannot validate a judicial proceeding void for want of jurisdiction, it follows that no rights can be predicated upon the order of the County Court declaring the route surveyed a public highway.

The evidence tends to show that John Graham, the plaintiff's grantor, admitted, while holding the legal title, that a county road had been established across the premises, but, whatever the effect of such admissions may be, we think they are rendered inoperative by reason of an adverse user by the plaintiff and her predecessors in inter-

est. The evidence also tends to show that the premises border upon Depot Slough, a navigable stream, and that they are submerged thereby at high tide; that John Graham erected on the land a small warehouse, which remained there several years; that his son Joseph built a sidewalk provided with a rail and banisters across the upper end of said premises, about from two to five feet above the surface of the ground, and that this walk has been constantly maintained thereon more than ten years prior to the commencement of this suit. It is true, the evidence tends to show that this walk has been taken up a few times to permit persons to drive to the slough, but otherwise there has been an uninterrupted obstruction to travel. It may well be doubted that the road was ever opened across the premises, though it appears that about twenty years ago some persons landed horses and cattle from a scow, which were driven over the same, and that some wood and hay had been landed in the same manner and hauled across; but there has not been, in our judgment, such a use of the premises as to indicate that a public road had ever been established there. The store and butcher shop have not been built ten years, but we think there has been such an adverse user as to bar the right of the public, and for this reason the decree is reversed, and one will be entered here perpetually enjoining the defendants from trespassing upon said premises.

REVERSED.

Argued December 14, 1896; decided March 1, 1897.

SIME v. SPENCER.

(47 Pac. 919.)

30 340
38 141
30 340
38 817

1. JURISDICTION OF COUNTY COURT IN OPENING HIGHWAYS.—It must now be regarded as firmly settled in Oregon that county courts, while in the exercise of their prescribed powers in the laying out, altering, and vacating of county roads, are courts of limited and inferior jurisdiction, and that every essential jurisdictional fact must affirmatively appear by the record in support of its orders; but, when once it has acquired jurisdiction, the same intendments obtain in favor of the regularity of its proceedings as prevail in courts of general jurisdiction: *Bewley v. Graves*, 17 Or. 274; and *State v. Myers*, 20 Or. 442, approved and followed.
2. PETITION FOR HIGHWAY—SUFFICIENCY OF DESCRIPTION—CODE, § 4062.—Under section 4062 of Hill's Code, requiring a petition for a county road to "specify the place of beginning," etc., a petition which merely describes the road as "commencing in the center of the county road leading from P. to A., at a point about 150 yards in a southwesterly course from the dwelling of S., thence," etc., is insufficient, as it does not indicate with reasonable certainty the point of beginning: *Ames v. Union County*, 17 Or. 600, distinguished.

From Benton: J. C. FULLERTON, Judge.

This is a suit by Alex Sime to enjoin Wm. Spencer, who is the supervisor of road district No. 30, in Benton County, from opening a newly laid county road ordered opened by the County Court. A demurrer was interposed to the complaint, which was sustained, and a decree entered in favor of defendant, dismissing the complaint, and for costs and disbursements. Plaintiff appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. W. S. McFadden*.

For respondent there was a brief over the names of

Joseph H. Wilson and *Geo. M. Brown* with an oral argument by *Mr. Wilson*.

Opinion by MR. JUSTICE WOLVERTON.

1. The only question in this case is whether the County Court of Benton County, Oregon, acquired jurisdiction to view, lay out, locate, and open the alleged county road, the opening of which plaintiff is resisting, and its solution depends mainly upon the sufficiency of the petition for such road. It may now be regarded as firmly settled that the County Court, while in the exercise of its prescribed powers in the laying out, alteration, and vacation of county roads, is a court of limited and inferior jurisdiction, and that every essential jurisdictional fact must therefore affirmatively appear by the record in support of its orders; but, having once acquired jurisdiction, the same intendments obtain in favor of the regularity of its proceedings as prevail in courts of general jurisdiction: *Bewley v. Graves*, 17 Or. 274 (20 Pac. 322); *State v. Myers*, 20 Or. 442 (26 Pac. 307); *Thompson v. Multnomah County*, 2 Or. 34; *Johns v. Marion County*, 4 Or. 46; *State v. Officer*, 4 Or. 180; *Canyonville Road Co. v. Douglas County*, 5 Or. 280.

2. One of the statutory instrumentalities by which jurisdiction is acquired for the establishment of a county road is the petition, which it is prescribed "shall specify the place of beginning, the intermediate points, if any, and the place of termination": Hill's Code, § 4062. Now, the complaint for the injunction is predicated upon the alleged insufficiency of the petition, in not having specified with reasonable certainty and definiteness either the place of beginning or termination. The description of the proposed new road is as follows: "Commencing in the center of the county road leading from Philomath to Alsea Valley, at a point about 150 yards in a southwesterly course from the dwelling of Alex Sime; thence running in an easterly direction through the lands

of A. Sime and Isabella Gallatly, and between the graveyard and the creek on the Gallatly land; and thence through the land of Joseph Gray to a point near the small creek known as 'Gray Branch,' about 100 yards below where the present county road crosses said creek; thence up the valley of said small creek to the present county road as traveled from Philomath to Alsea." In *Johns v. Marion County*, 4 Or. 46, the last course and termination was described in the petition as follows: "Thence southerly to intersect the county road near the foot of Nevil Hill, near the south line of John A. Johns' land claim"; and it was held that the place of termination was entirely too indefinite to be deemed a compliance with the statute. It was said in a later case (*Canyonville Road Co. v. Douglas County*, 5 Or. 280) that the court went to the extreme verge of the law in *Johns v. Marion County*. BURNETT, J., however, dissented from the view taken by the majority of the court, and thought that the Johns case was decisive of the question under discussion. In a still later case (*Woodruff v. County of Douglas*, 17 Or. 315, 21 Pac. 49), under the following description, viz.: "Thence southwest above said Archambeau's barn, westerly on the premises of Joseph Champagne on the most practicable route, and through the premises of the said Champagne, leaving his house to the left, and intersecting the present Cole's Valley and Roseburg County Road at a point between the residence of Charles La Point and O'Brien," it was held that the petition wholly failed to designate or specify the particular or distinct point of termination of the proposed road, and did not answer the requirements of the statute, and that by reason thereof the court acquired no jurisdiction to locate the road in question.

The place of beginning in the petition which we are now considering is not more definitely fixed or described than

in either of the cases above referred to. It is designated as being in the center of the county road, etc., at a point about 150 yards in a southwesterly course from the dwelling of Alex Sime. The dwelling is undoubtedly a monument capable of identification, but, taking it as the initiative point from which to ascertain the place of beginning of the proposed road, we have yet to find the place through the instrumentality of two terms, viz.: "about" and "southwesterly course," employed for the purpose, which are by nature indefinite. "About" signifies nearly, approximately, in the neighborhood of, not much more or less: Black's Law Dictionary. So that we may say the place of beginning is approximately 150 yards from the dwelling of Alex Sime. But a "southwesterly course" may mean any direction between south and west lines, and it would be impossible through the agency of these terms to locate any definite or distinct point in the center of the county road leading from Philomath to Alsea. *Ames v. Union County*, 17 Or. 600 (22 Pac. 118), is not in point upon this question. There the "Clarke cabin" marked the place of beginning, which was described as being situate "about forty rods west and about thirty rods north from the southeast corner of section 6," etc. From the description the "Clarke cabin" was easily located. One of the purposes of the statutory requirements of the petition is, no doubt, to place interested parties in the possession of information so distinct and definite as that they might know with reasonable certainty in what manner and to what extent they will be affected by the establishment of the proposed road. While a slight variance in many instances might not make any material difference, yet in others it may become of vital importance, and the law should receive such a construction as will make it effective under all conditions and circumstances. Such has been the trend of former cases. We think the petition under

consideration is fatally defective, as it respects the location of the place of beginning, and the termination point is scarcely more specific. This being so, the County Court had no jurisdiction to establish or order the road in question to be opened; hence the defendant being without authority in the premises, the complaint is sufficient. The decree of the court below will, therefore, be reversed, and the cause remanded with instructions to overrule the demurrer.

REVERSED.

Argued December 28, 1896; decided March 16, 1897.

JENNINGS v. GARNER.

(47 Pac. 177.)

30 344
a38 50

PRACTICE—MOTION TO STRIKE OUT TESTIMONY.—A motion to strike out must be directed entirely to incompetent matter, for if any of the matter to which it refers is competent, the request must be refused.

From Multnomah: E. D. SHATTUCK, Judge.

This is an action by John J. Jennings against Anna P. Garner and others to recover commissions alleged to have been earned by plaintiff in procuring the exchange of certain real and personal property in behalf of the defendants. The complaint shows, among other things, that plaintiff was a real estate agent and broker; that prior to November 28, 1894, the defendants listed with him certain real and personal property for exchange or sale, agreeing, in case he procured the sale or exchange thereof, to pay him a commission of two and one-half per cent. on its selling or exchange value; that on the 28th day of December, 1894, plaintiff effected an exchange of said property with one H. E. McDaniels, for certain real and personal property of his; that the agreed exchange value was \$10,500;

and that the commission thereon amounts to \$262.50, for which sum with interest plaintiff prays judgment. At the trial, the evidence tended to show that in the spring of 1894 the defendant A. B. Carswell listed the said property with plaintiff; that in September following defendant Garner listed the same property with him, and that it was not owned jointly by them, but in parcels in their individual rights. H. E. McDaniels, a witness in behalf of plaintiff, was asked whether at a certain time he had a conversation with either J. S. Garner or A. B. Carswell in regard to their relations with plaintiff, to which he answered that Garner and Carswell said they were the agents of defendants Anna P. Garner, A. S. Garner and W. J. Garner, and that they had entered into an agreement to pay the plaintiff two and one-half per cent. commission on \$10,500. Whereupon defendants asked the court to strike said evidence from the record for the reason that it was incompetent, immaterial, and irrelevant. The request was overruled, and an exception allowed. The court instructed the jury, among other things, as follows: "An employment can be made by express terms or it can be made by implication. Parties coming together and in unequivocal terms agreeing upon a certain matter makes an express contract, but if parties act toward one another in such manner as to indicate that one is employed by the other to do certain things, although there are no direct words of employment, that is an implied contract. * * * An implied contract sometimes arises from a party who has not constituted another his agent, but, after that agent has accomplished some act, he takes what benefit may arise from it. In such case as that there is an implied contract, and the taking of the benefit implies that he assumes the charges therefor. Where the effects and the results of the agent's actions are accepted and enjoyed by the principal, the principal is bound as much as if he had

accepted it in the beginning," to all which relating to an implied agency the defendants objected. The verdict and judgment were for plaintiff, and defendants appeal, and assign as errors that the court allowed evidence to be given of the declarations made by alleged agents for the purpose of proving their agency, and that it erroneously instructed the jury as it respects an implied agency.

AFFIRMED.

For appellants there was a brief over the name of *Joseph W. Metcalf*, with an oral argument by *Messrs. Andrew M. Crawford* and *William R. Willis*.

For respondent there was a brief and an oral argument by *Mr. Michael G. Munly*.

MR. JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

It is contended that, inasmuch as agency cannot be proven by the declarations of the agent, the court erred in refusing to grant defendants' request to strike out the answers of witness McDaniels set forth in the foregoing statement. The answer is a little ambiguous, but it is susceptible of the construction that A. B. Carswell and J. S. Garner said they were the agents of the other defendants named, and that they—Carswell and J. S. Garner—had entered into an agreement to pay plaintiff two and one-half per cent. commission on \$10,500. Now, it may be admitted that it was incompetent for the witness to state what Carswell and Garner said touching their agency, but the statement touching what they said as it respects the commission agreed to be paid was perfectly competent and relevant, because it was a disputed question whether there was an agreement to pay a commission.

The request to strike out, therefore, conjoined matter that was competent with such as may be said to be incompetent, without discrimination, and, such being the case, it was proper for the court to deny the request. It is the duty of a party to separate the incompetent from the competent testimony, for when the two are indiscriminately combined the motion to strike out should be overruled: 1 Thompson on Trials, § 719. In *Wolfe v. Pugh*, 101 Ind. 294-307, ZOLLARS, C. J., said: "The motion included all the conversations of Osborn with Pugh, some of which were clearly competent. If any of the evidence was competent, it was not error to overrule a motion to strike out the whole of it." And in *State v. Hymer*, 15 Nev. 49, it was held that the motion to strike out all the testimony of a witness, when any portion thereof is admissible, should be denied. See also *Louisville, etc., Ry. Co. v. Falvey*, 104 Ind. 409 (3 N. E. 389). The court was therefore, not in error in refusing the request.

The assignment of error touching the court's instructions is vague and indefinite. However, this supposed defect was not insisted upon at the oral argument, but it was contended that it was error to instruct the jury at all touching an implied contract, and that any testimony which went to the jury tending to prove such a contract was clearly incompetent under the pleadings. The answer to this is that there were no objections whatever made at the trial to the introduction of such testimony, nor were there any exceptions taken to the instruction sufficiently pertinent to save the questions suggested for the consideration of this court, and it is now too late to predicate error touching the action of the court below in that regard.

AFFIRMED.

Argued December 30, 1896; decided March 16, 1897.

WEAVER v. SOUTHERN OREGON CO.
(48 Pac. 171.)

1. **DEFAULT AS A WAIVER OF DEFECTS IN PLEADINGS.**—The question of the sufficiency of a complaint cannot be raised on appeal from a judgment given for want of an answer: *Askren v. Squire*, 29 Or. 228, applied.
2. **SERVICE OF PROCESS ON CORPORATION.**—Service of summons on one of the principal officers of a private corporation at its principal office or place of business gives the court jurisdiction of the corporation, regardless of whether the officer served resided in or had an office in such county; though, where the service is made on some inferior clerk or agent, the return must show the facts authorizing such substituted service: *Caro v. Oregon & California R. R. Co.*, 10 Or. 510, cited and approved.
3. **AMENDMENT OF RETURN—DISCRETION OF COURT.**—The practice in allowing amendments to returns of writs should be liberally exercised in furtherance of justice.

From Coos: J. C. FULLERTON, Judge.

Action by John Weaver against the Southern Oregon Company. From a judgment in favor of plaintiff, defendant appeals.

AFFIRMED.

For appellant there was a brief by *Mr. John A. Gray*, with an oral argument by *Mr. J. W. Hamilton*.

For respondent there was a brief and an oral argument by *Mr. A. J. Sherwood*.

Opinion by MR. JUSTICE BEAN.

On the 23d of September, 1895, the plaintiff commenced this action against the defendant corporation, in the county where its principal office or place of business is located, to recover money, and caused a summons to be

regularly issued and served upon its secretary at such office or place of business, but in his return the sheriff omitted to state the place of service. The defendant failed to appear and answer the complaint, as required by the summons; and on the second day of the next succeeding term of court, the sheriff applied for and obtained leave to amend his return to conform to the facts, and thereupon amended his certificate of service so as to read as follows: "I hereby certify that I served the within summons within the said State and County on the 23d day of September, 1895, on the within-named defendant, the Southern Oregon Company, by delivering a copy thereof, prepared and certified to by me as sheriff, together with a copy of the complaint, prepared and certified to by D. F. Dean, county clerk and ex-officio clerk of the said Circuit Court, to R. E. Shine, the secretary of the Southern Oregon Company, defendant. The said copies of said summons and complaint were delivered to the said secretary of said defendant at the principal office and place of business of defendant, at the town of Empire City, Coos County, Oregon." On the next day the default of defendant was duly entered, and judgment for want of an answer rendered against it for the amount prayed for in the complaint, from which this appeal is taken.

The contention for the defendant is (1) that the complaint does not state facts sufficient to constitute a cause of action; (2) that the return as amended by the sheriff is insufficient to give the court jurisdiction of the defendant, because it does not show that the officer upon whom service was made either resided in or had an office in Coos County; and (3) that the court erred in permitting the sheriff to amend his return. Neither of these positions is sound.

1. No objection was made to the complaint in the court below, and its sufficiency cannot be raised in this

court by an appeal from a judgment given for want of an answer: *Askren v. Squire*, 29 Or. 228 (45 Pac. 779).

2. The service of the summons upon the secretary of defendant, at its principal office or place of business in the county where the action was commenced, was a valid service upon the corporation, although it does not affirmatively appear from the return of service that such officer resided in or had an office in the county. Where jurisdiction of a private corporation is sought to be obtained by service upon some inferior clerk or agent, it is necessary for the return to show the facts which authorize such substituted service: *Caro v. Or. & Cal. R. R. Co.*, 10 Or. 510. But when the service is made upon one of the principal officers enumerated in the statute, at the principal office or place of business of the corporation, the court thereby acquires jurisdiction of the person without any showing that the officer upon whom the process was served resided in or had an office at such place.

3. There was no error in permitting the sheriff to amend his return. The allowance of such amendments is a matter within the sound discretion of the trial court, and its action will not be reviewed here, except for an abuse of such discretion. It is a power which ought always to be liberally exercised in furtherance of justice: 22 Am. & Eng. Enc. Law (1st Ed.), 200; *Malone v. Samuel*, 13 Am. Dec. 172, and note.

AFFIRMED.

Argued December 23, 1896; decided March 16, 1897.

SMITH v. MINTO.

(48 Pac. 166.)

30	351
38	392
38	395
30	351
41	8

1. MUNICIPAL POWER TO MAKE STREET IMPROVEMENTS.—The power of a city council in the matter of street improvements is a special one and must be exercised in strict conformity with the authority conferred; thus, where a city charter gives the council power to order a street improved whenever it shall be unsafe, the street must be unsafe in fact, or the improvement will not be binding on the property owners—the resolution of the council declaring the street dangerous is not conclusive on the courts.
2. ESTOPPEL—LACK OF JURISDICTION.—Where a street improvement is undertaken without jurisdiction, the adjoining property owners are not estopped from resisting payment therefor by having failed to object while the work was in progress: *Strout v. City of Portland*, 26 Or. 294, applied.

From Multnomah: LOYAL B. STEARNS, Judge.

Suit for an injunction by Milton W. Smith against John W. Minto, chief of police of Portland, to restrain the collection of a certain street assessment. Plaintiff prevailed, and defendant appealed.

AFFIRMED.

For appellant there was a brief by *Mr. Roscoe R. Giltner*, former city attorney, with an oral argument by *Mr. William M. Cake*, corporation counsel.

For respondent there was a brief over the names of *Milton W. Smith*, *Walter S. Perry*, and *Geo. G. Gammans*, with an oral argument by *Mr. Perry*.

Opinion by MR. JUSTICE BEAN.

This suit was brought by the plaintiff, for himself and all others similarly situated, who might become parties thereto, to restrain the collection of an assessment for grading and improving Multnomah street, between the

north line of Grover and the south line of Curry streets, in the City of Portland. The facts are that on November 18, 1891, the common council, by resolution, declared the portion of Multnomah street referred to to be unsafe and dangerous to persons and teams, and thereupon, without any petition from the property owners, proceeded to improve it at the expense of abutting property, by grading, laying sidewalks, crosswalks with box gutters, and by macadamizing the roadway the full width. The validity of the proceeding is challenged by the plaintiff, an owner of abutting property, on the ground (1) that as a matter of fact the street was not unsafe and dangerous within the meaning of the charter at the time the improvement was ordered; and (2) that, if it was, the council could only make such improvement at the expense of the property owners as was necessary to render it safe. After the issues were made up, the suit was referred to Judge Thayer, who reported that the street was not unsafe and dangerous to persons or teams, and therefore it could not be improved at the expense of abutting property without a petition. His report was confirmed by the trial court, and the city appeals.

1. The decree is clearly right. The power of a city council in the matter of street improvements is a specially delegated authority, and its acts are legal only when in strict conformity with the authority conferred. By its charter (Laws 1891, p. 823, et seq.), the City of Portland has power and is authorized to improve any street or part thereof within the corporate limits (section 94); but no such improvement can be undertaken or made without ten days' notice thereof being first given by publication in some daily newspaper published in the city, and no such notice shall be given unless the owners of one-half of the property affected by such improvement shall petition for the same (section 95). By section 120 it is provided, how-

ever, that the proceedings for the improvement of a street or part thereof may be taken without giving the notice required by section 95, whenever the owner or owners of two-thirds of the adjacent property shall in writing petition the council therefor; and, whenever any street or part thereof shall be in such condition as to be unsafe or dangerous to persons or teams passing on, along, or over the same, the council may declare that fact by resolution, and thereupon cause the improvement of such street to be made without any petition therefor. From these provisions of the charter it is apparent that the power of the city to improve a street depends upon the assent or petition of a given number of property owners, unless it is in fact unsafe and dangerous to teams passing on, along, or over the same, in which case no petition is necessary. It is not claimed that the improvement in question was made upon the petition of the property owners, and, therefore, the power of the council to proceed in the matter depended upon the fact of the street being unsafe and dangerous to persons and teams, within the meaning of the latter clause of section 120, at the time the improvement was ordered. This is a jurisdictional matter, and the findings thereon of the city council are not conclusive upon the question: 2 Dillon on Municipal Corporations (4th Ed.), § 800. Unless the street was, in fact, in such a condition, the city was without power or jurisdiction in the premises, and its proceedings are void. The referee found that there was nothing in the condition of the street to render it unsafe or dangerous, and this finding is abundantly sustained by the testimony. The evidence shows that it was an ordinary level dirt street which had become almost if not quite impassable for heavily loaded teams, on account of the traffic thereon during the rainy season, but it was in no sense unsafe or dangerous for either persons or teams. It was probably in no worse condition than any other dirt

street in the city would have been if subjected to the same amount and character of travel during the winter season, nor were persons and teams traveling thereon exposed to any more or greater danger than they would be in making a like use of any road, street, or driveway, which, by rain and constant use, had become excessively muddy. But such a condition of a street is not sufficient to authorize its improvement at the expense of adjoining property without the petition required by the charter. The general rule prescribed by that instrument is that no such improvement shall be made except upon the request of the owners of at least one-half of the property affected thereby, and the latter clause of section 120 is merely an exception to this rule, and applicable only to cases where the insecurity or danger to persons or teams from the condition of the street is such as to require attention on the part of the council to prevent serious injury or casualty. We conclude, therefore, that Multnomah street was not in such condition as to authorize the proceedings in question upon the part of the common council, in the absence of a petition from the abutting property holders.

2. Nor is there any room in this case for an application of the doctrine of estoppel, on the ground that the plaintiff made no objection to the improvement while it was in progress, because the court was without jurisdiction from the very beginning, and in such case the doctrine does not apply: *Strout v. City of Portland*, 26 Or. 294 (38 Pac. 126). The decree of the court below is therefore affirmed.

AFFIRMED.

Argued December 15, 1896; decided March 16, 1897; rehearing denied.

30 855
36 496

HAAS v. DUDLEY.

(48 Pac. 168.)

1. ASSUMPTION OF DEBT BY PURCHASER OF MORTGAGED PREMISES—
NATURE OF CONTRACT.—An agreement by a purchaser of mortgaged premises to assume and pay the incumbrance, and to save the grantor harmless therefrom, is not a contract of indemnity only, but is an absolute undertaking to pay the mortgage debt when due, and if that is not done, there is an immediate right of action, whether the grantor has paid the debt or not.
2. MEASURE OF DAMAGES FOR BREACH OF COVENANT TO PAY A MORTGAGE.—Where part of a mortgaged tract is conveyed to grantees who covenant to pay the debt and save the mortgagor harmless therefrom, but the entire premises are afterward sold under the mortgage foreclosure, the measure of recovery on the broken covenant is what the reserved part of the tract was worth at the time of the foreclosure.

From Multnomah: HARTWELL HURLEY, Judge.

Some time prior to September 29, 1892, the plaintiff Jacob Haas purchased of one Shaw certain real property situate in Mt. Tabor Garden Addition, in Multnomah County, Oregon, upon which there was a mortgage to secure the payment of \$5,812, and, as part of the purchase price, assumed and agreed to pay \$5,712 of the sum so secured. On the date named, plaintiff sold to the defendants W. L. Dudley, T. C. Powell, T. A. Jordan, and W. A. Cardwell a portion of such real property, consisting of 163 lots, and conveyed the same by deed to the defendant Powell, as trustee for the use and benefit of all the defendants, leaving of such property 175 lots unsold. The deed contains a warranty against all incumbrances except the mortgage above referred to, and a stipulation to the effect that the grantee assumes the payment of \$5,712 thereof. At the same time, and as part of the same transaction, the defendants entered into an undertaking with plaintiff, whereby it was stipulated, among other things, that,

"Whereas, said Jacob Haas is so selling and conveying to said T. C. Powell, for our benefit only, 163 lots of said property by him purchased from said Edson L. Shaw, and retains 175 lots of said property, as shown by said deed from Shaw; and, whereas, we are to assume and pay and save said Haas harmless from all of said mortgage, and, in the event of his selling or disposing of any said remaining lots, to discharge said mortgage as to such lots; now, therefore, * * * we further, and for the same consideration herein above expressed, jointly and severally promise and agree to and with said Jacob Haas, his heirs, grantees, and assigns, that we will at any time when Jacob Haas, his heirs, grantors, or assigns, shall sell or desire to sell or dispose of any of the remaining lots or blocks, or the whole thereof, in said 'Mt. Tabor Garden' still owned by him at the date of this instrument, fully pay, satisfy, and discharge said mortgage, so far as it may be a lien upon said lot or lots he may desire to sell or release, so that he can, in so far as said mortgage is a lien thereon, sell and convey the same free from incumbrances. And we agree to assume and pay off said mortgage in so far as said Haas, his heirs, grantees, and assigns are concerned or in any way liable, and save him and them wholly harmless therefrom, and satisfy, release, and discharge the same in so far as it forms any lien upon the remaining lots in said tract yet owned by said Haas, or by him conveyed to said T. C. Powell." Thereafter plaintiff sold some of the remaining lots, which the defendants failed to have released from the lien of the mortgage as agreed, and later on the mortgage was foreclosed, the property covered by it sold, and the demand thereby satisfied, leaving no surplus. The court instructed the jury at the trial that the measure of plaintiff's recovery was the value, at the time of the foreclosure sale, of the 175 lots so reserved by him. The plaintiff asked for the following instruction, which was

refused: "I instruct you that the measure of damages in this case is the amount fixed by the contract signed by the defendants and introduced in evidence by plaintiff, and agreed then to be paid, with the interest thereon, less any amounts which you may find that the defendants, or either of them, have paid thereon since the date of the said contract, if you find that any payments have been made." There were objections to the introduction of testimony which saved to the plaintiff the same questions raised upon the instruction given and the one asked and refused. The verdict was in favor of plaintiff for \$1,407, and judgment accordingly, from which he prosecutes this appeal.

AFFIRMED.

For appellant there was a brief over the name of *Starr, Thomas & Chamberlain*, with an oral argument by *Mr. Frank A. E. Starr*.

For respondents there was a brief over the name of *Stott, Boise & Stout*, with an oral argument by *Mr. Raleigh Stott*.

MR. JUSTICE WOLVERTON, after stating the case in the foregoing language, delivered the opinion of the court.

I. Two questions are presented: First, What is the nature of the defendants' obligation upon which plaintiff seeks to recover? Is it an absolute obligation to pay plaintiff's liability, or is it merely an undertaking of indemnity? And, second, What is the measure of plaintiff's relief? An undertaking to pay the debt for which another is obligated or has assumed to pay may be sued upon by the obligee and recovery had to the limit of the undertaking, or in so far as the same remains undischarged, as soon as default has been suffered; and this regardless of

whether the obligee has paid the debt or not: *Hodgson v. Bell*, 7 T. R. 93; *Penny v. Foy*, 8 Barn. & C. 11; *Loosemore v. Radford*, 9 Mees. & W. 657; *Lethbridge v. Mytton*, 2 Barn. & Adol. 772; *Robinson v. Robinson*, 24 L. T. 112; *Ham v. Hill*, 29 Mo. 275; *In re Negus*, 7 Wend. 498; *Port v. Jackson*, 17 John. 238; *Merriam v. Pine City Lumber Co.*, 23 Minn. 322; *Lathrop v. Atwood*, 21 Conn. 116; *Hume v. Hendrickson*, 79 N. Y. 127; *Hall v. Nash*, 10 Mich. 303; *Redfield v. Haight*, 27 Conn. 31; *Furnas v. Durgin*, 119 Mass. 500 (20 Am. Rep. 341). It was early objected that, if the obligee was permitted to recover before he had discharged the debt due the principal creditor, the obligor might be required to pay the same debt twice. Such was the objection made in *Loosemore v. Radford*, 9 Mees. & W. 657, upon the following state of facts: Two persons being jointly indebted upon a promissory note, one as principal and the other as surety, the principal covenanted with the surety to pay the amount of the note to the payees on a given day, but made default, and was sued upon his covenant. In determining the liability, Baron PARKE says: "This is an absolute and positive covenant by the defendant to pay a sum of money on a day certain. The money was not paid on that day, nor has it been paid since. Under these circumstances, I think the jury was warranted in giving the plaintiff the full amount of money due upon the covenant. If any money had been paid in respect of the note since the day fixed for the payment, that would relieve the plaintiff pro tanto from his responsibility. The defendant may, perhaps, have an equity that the money he may pay to the plaintiff shall be applied in discharge of his debt; but at law the plaintiff is entitled to be placed in the same situation under this agreement, as if he had paid the money to the payees of the bill." In *Robinson v. Robinson*, 24 Law T. 112, by an indenture of dissolution of a partnership, the defendant, who acquired

the partnership property, covenanted to pay and satisfy within eighteen months all the debts of the partnership, and to indemnify and save plaintiff harmless from all costs, losses, claims, and demands, which he might incur or become liable for in respect of the partnership debts. In an action against defendant upon this covenant, Lord CAMPBELL held that the measure of damages was the whole amount of the debts which he had not paid, whether they had been paid by the plaintiff or he had given promissory notes for them or not.

In *Ham v. Hill*, 29 Mo. 275, under a similar state of facts, where the covenant was "to assume all partnership liabilities of said firm incurred between April 1, 1858, and July 1, 1858, and to pay the same whenever payment is demanded legally by the creditors of said firm," EWING, J., speaking for the court, said: "As to the measure of the damages in this case, if the plaintiff is entitled to recover, we see no reason why he should not recover the sum due by the bond. Of course, if the bond has been paid in part, or otherwise satisfied, the defendant will be entitled to the benefit of such payment or satisfaction. The presumption is that the plaintiff gave full consideration for the bond, and, if it is not discharged, the defendant should pay the amount of it." In *Furnas v. Durgin*, 119 Mass. 500 (20 Am. Rep. 341), there was an exchange of lands, and the defendant accepted of plaintiff a deed to Hyde Park Estate, containing this clause: "Subject to mortgages amounting to \$6,500, which the grantee hereby assumes and agrees to pay." Among these mortgages was one for \$1,500, for the non-payment of which plaintiff brought an action to recover the amount thereof. DEVENS, J., says: "There is an embarrassment, undoubtedly, where the agreement is to pay a debt due from the promisor as well as the promisee. * * * As the Hyde Park estate, now the property of the defendant, is charged

with the payment of the mortgage debt, if the plaintiff should not devote the sum recovered by him to its payment, the defendant might hereafter, in order to relieve his property, be compelled to pay the amount a second time. There is no mode, at law, by which this difficulty can be avoided, and the plaintiff enabled to receive the benefit of his contract." And the measure of damages was considered to be the amount of the debt and interest, notwithstanding the grantor had not paid it. These cases are sufficient to illustrate the rule announced, and to show how firmly it has become established. But, if the obligation is merely to save another harmless from the payment of such a debt, then recovery can only be had to the extent of the damaged actually sustained. This further principle finds illustration in many of the cases above cited, and further comment thereon is unnecessary.

Whether the defendants' obligation is an absolute promise to pay, or merely an undertaking to indemnify and save harmless, depends upon the construction of the instrument by which they are bound. In *Locke v. Honer*, 131 Mass. 93 (41 Am. Rep. 199), it was held that the acceptance by the grantee of a deed poll containing a covenant that the land conveyed is free from incumbrances except a certain mortgage "which the grantee assumes and agrees to hold the grantor harmless from," constituted a contract by the grantee not merely to indemnify the grantor, but to pay the mortgage debt, and that the measure of damages in an action upon this contract was the unpaid amount of the debt, although no part of it had been paid by the plaintiff, the grantor. In *Gage v. Lewis*, 68 Ill. 617, the condition of the bond was "that if the said Carhart should pay all of said debts, claims, and demands due or to become due by the said firms of Carhart, Lewis & Co., and Carhart, Lewis & Tappan, to any and all persons whatsoever, * * * and save, indemnify, and keep

harmless the said Charles A. Lewis therefrom," construing which the court said: "It has ever been held that where a bond is given, intended as a bond to indemnify, but containing a covenant that the obligor will pay certain debts, for the payment of which the obligee is liable, and the obligor fails to perform, an action lies for the breach, and the obligee is entitled to recover the sums agreed to be paid, although it is not shown that he has been damaged, unless, from the whole instrument, it manifestly appears that its sole object was a covenant of indemnity." In *Stout v. Folger*, 34 Iowa, 71 (11 Am. Rep. 138), the language of the covenant was, "The said John M. Folger hereby agrees to assume in my place and stead, and save me harmless from, all indebtedness contracted by me." This was held to be an agreement by Folger not merely to indemnify Stout, his grantor, but also to assume Stout's debt, which was equivalent to an absolute undertaking to pay it; and that Stout was therefore entitled to recover the whole amount of the debt.

As covering the doctrines hereinbefore announced, as well as the construction of the instrument sued on, the following language of CHURCH, C. J., in *Lathrop v. Atwood*, 21 Conn. 116, is direct and pertinent. He says: "We think an examination of the cases will show these reasonable doctrines; that if a condition, covenant, or promise be only to indemnify and save harmless a party from some consequence, no action can be sustained for the liability or exposure to loss, nor until actual damage, capable of appreciation and estimate, has been sustained by the plaintiff. But if the covenant or promise be to perform some act for the plaintiff's benefit, as well as to indemnify and save him harmless from the consequence of non-performance, the neglect to perform the act, being a breach of the contract, will give immediate right of action." See also *Dye v. Mann*, 10 Mich. 291; *Reed v.*

Paul, 131 Mass. 129. Measured by these authorities, we think the undertaking sued on here is an absolute promise to pay the \$5,712, with accrued interest thereon, when the same became due by virtue of the terms of the original mortgage. The words of the undertaking are: "We agree to assume and pay off said mortgage in so far as said Haas, his heirs, and assigns are concerned, or in any way liable, and save him and them wholly harmless therefrom." Here is an absolute undertaking to pay in so far as Haas had made himself liable, viz.: to the extent of \$5,712 of said mortgage, coupled with an indemnity agreement to save him harmless; and when the indebtedness became due under the mortgage, and defendants failed to pay, plaintiff's right of action was then ripe, and the measure of his relief was the full amount of the indebtedness assumed, whether he had paid it or not.

2. But the mortgage has since been foreclosed, and the demand has been wholly satisfied out of the proceeds of the lots retained by plaintiff and those conveyed to the defendant Powell as trustee so that plaintiff has been entirely relieved of the liability assumed by him under his contract with Shaw, but the proceeding and process which the defendants suffered to be enforced, whereby that result was brought about, absorbed the lots retained by him, which, if defendants had observed the conditions of their undertaking, would have enured to him unencumbered with such indebtedness. Now, notwithstanding the foreclosure proceedings, and the consequent discharge and exoneration of plaintiff from his liability, he contends that he is still entitled to recover from the defendants the full amount of the indebtedness assumed by them, and that such indebtedness is the measure of his relief in the present action. Under the rule invoked in support of this contention, it must be and is admitted by the instruction asked for, that if defendants paid anything upon the

demand they ought to have credit for it, and that the measure of relief would be the amount of the balance remaining unpaid; and it must also be admitted that the defendants' property contributed to the payment of the demand, so that the rule, if applied, would constitute the balance unpaid, after the application of defendant's property to the demand, as the measure of damages. But we do not think it at all applicable under the circumstances and conditions surrounding this case. The simple fact is, plaintiff's liability has been discharged, and he has lost his lots in the transaction. If he is not chargeable with any duty which, if discharged, would have prevented the loss of the lots, he should recover their value; otherwise he would probably be without remedy.

There is a rule which requires a party entitled to the benefit of a contract to protect himself from loss arising from a breach, if it can be done at trifling expense, or with reasonable exertion, and restricts him to such damages only as with reasonable endeavor and expense he could not prevent: *Miller v. Mariner's Church*, 7 Me. 51 (20 Am. Dec. 341). It has been held, however, that the rule is not applicable to a contract of the nature we are considering, where there was in effect an absolute promise to pay, and not one of indemnity merely: *Wicker v. Hoppock*, 73 U. S. (6 Wall.) 94. Plaintiff, of course, was aware of the foreclosure sale, and he could, if he had seen fit, perhaps have secured the sale of defendants' lots first; and if they did not sell for enough to satisfy the mortgage, he could have paid the balance, and this balance, under the rule above discussed, would have been the measure of his damages. The defendants, however, became the principal debtors, as between them and the plaintiff, when they assumed the payment of the \$5,712 upon the mortgage, and the plaintiff remained simply as surety for them. The lots conveyed to the defendants

were primarily liable for the payment of the amount assumed, and the lots retained by plaintiff for a deficiency only. Under these circumstances it was not incumbent upon the plaintiff, nor was it a duty enjoined upon him, to raise money sufficient to discharge the obligation, as between him and the defendants, nor was he under any obligations to take any steps in the foreclosure proceedings. It was by the default of the defendants that he was deprived of his property, and the value thereof is the rightful measure of his demand against them: *Wilcox v. Campbell*, 106 N. Y. 325 (12 N. E. 823). That case comes near the case at bar, and is well reasoned. Any other rule of damages under a like state of facts would not be at all times adequate to the injury. It follows that there was no error in the court below, and the judgment is affirmed.

AFFIRMED.

Argued December 16, 1896; decided March 16, 1897; rehearing denied.

LIEBE v. NICOLAI.

(48 Pac. 172.)

80	864
40	888
80	864
48	814
30	864
147	370
30	364
48	479

1. CONCLUSIVENESS OF FINDINGS ON APPEAL.—A finding of fact by a trial court in a law action will not be disturbed on appeal if there is any evidence to support it: *Williams v. Gallick*, 11 Or. 337; and *Bartel v. Mathias*, 19 Or. 483, approved and followed.
2. LANDLORD AND TENANT—"FUTURE ERECTIONS AND ADDITIONS."—Dynamos and other electrical machinery placed in a leased building for the purpose of furnishing power for an electric light system are not "erections or additions" to the leased premises, within the terms of the lease requiring erections and additions thereon to be surrendered with the premises to the landlord on the termination of the lease; that expression is limited to new buildings erected or additions made to old structures, and does not refer to chattels or trade fixtures brought onto the leased premises by the tenant.
3. LANDLORD AND TENANT—LEASE—PAYMENT OF RENT.—A clause in a lease requiring the rent to be paid "in monthly payments," the first to be made on the first day of the term, does not require payment in advance for each succeeding month; and a forfeiture of the lease cannot be declared by the lessor for a failure to pay in advance for a subsequent month.

4. **EFFECT OF SETTING ASIDE REPORT OF REFEREE.**—A trial court, in an action at law, has the same control over a report of a referee that it has over the verdict of a jury, and its power to set aside such report extends to all the causes prescribed by statute for setting aside the verdict of a jury; and, where a trial court sets aside the report of a referee, in an action at law, and makes new findings, under section 229 of Hill's Code, providing that in such case the court may make another reference, or "may find the facts and determine the law itself," its findings of fact, though based on the evidence reported by the referee, are entitled to every presumption in their favor that would arise if made on an original trial by the court, and will not be reviewed on appeal when supported by any evidence: *Merchants' Nat. Bank. v. Pope*, 19 Or. 35, criticised and explained.
5. **POWER OF THE SUPREME COURT TO MODIFY JUDGMENTS AT LAW.**—The supreme court may differ from a trial court on the conclusions of law to be deduced from a given state of facts, in a law action, and thereupon remand the case with instructions to modify the judgment (see *Nodine v. Shirley*, 24 Or. 250; *Grant v. Paddock*, 30 Or. 821; and *Mitchell v. Holman*, 30 Or. 287); but it cannot review questions of fact in such cases, except to ascertain whether the findings are supported by any evidence.

From Multnomah: HARTWELL HURLEY, Judge.

Action at law for the possession of certain personal property. Plaintiff claims under a chattel mortgage given by the owner, while defendants insist that the machinery became attached to the freehold and could not be moved. The trial court held otherwise, reversing the referee, and defendants appeal.

AFFIRMED.

For appellants there was a brief over the name of *Nicholas & Davis*, with an oral argument by *Mr. H. B. Nicholas*.

For respondent there was a brief over the names of *Schuyler C. Spencer* and *McDougall & Jones*, with an oral argument by *Mr. Spencer*.

Opinion by MR. CHIEF JUSTICE MOORE.

This is an action by Theodore Liebe against Louis Nicolai and Theodore Nicolai, to recover the possession

of certain barber shop furniture and electric-light machinery, the plaintiff claiming the same by virtue of a chattel mortgage thereon, executed by one Eugene Stebinger, while the defendants claim title and right of possession of the furniture under a sale thereof upon execution, and the machinery by reason of its character as fixtures placed upon their premises by Stebinger, and not removed during the term of his lease thereof. The cause being at issue, was, by consent, referred to Wallace McCamant, Esq., who took and reported the evidence, and found therefrom that plaintiff had a right to the possession of the furniture, and defendants to the machinery. The court affirmed the referee's findings in relation to the furniture, but set them aside as to the machinery; and, having made findings of its own, to the effect that plaintiff was entitled to the latter class of property also, gave judgment for the return of all the property, or, if the same could not be had, for the value thereof, from which the defendants appeal.

1. The record discloses that on April 6, 1894, the defendants commenced an action in the Justice's Court of North Portland Precinct against Eugene and Mary B. Stebinger, to recover the sum of \$200, and on that day had said furniture attached in the action as the property of the Stebingers, and, having thereafter obtained a judgment for the amount demanded, caused an execution to be issued thereon, in pursuance of which the furniture so attached was sold to the defendants. On April 7, 1894, the plaintiff filed in the proper office a chattel mortgage upon all said property, which counsel for the defendants contend was fraudulent as to the creditors of Stebinger, claiming that it was executed on the day it was filed, but falsely dated as of the 4th of that month, and that the referee and court erred in failing to so find. It is a sufficient answer to say that the record shows there was evi-

dence to support the finding that the chattel mortgage was duly executed on April 4, 1894, for a valuable consideration, and recorded within five days thereafter, and, this being so, this court cannot inquire into the correctness of the finding of fact so made by the trial court upon the issue before it: *Williams v. Gallick*, 11 Or. 337 (3 Pac. 469); *Bartel v. Mathias*, 19 Or. 482 (24 Pac. 918).

The evidence also shows that the defendants are the owners in fee of the Merchants' Hotel Building in the City of Portland, and a brick store in the same block, both of which were demised to one Jacob Haas by separate agreements, the latter for the term of four years from January 1, 1892, at the monthly rental of \$75, the first installment thereof payable on the first day of the term, the lessee covenanting to deliver up the premises at the end of the term, "and all future erections and additions to or upon the same," and that, if the rent should be in arrear for the space of thirty days, the lessors might enter upon the premises and repossess the same as of their former estate. Haas assigned this lease to Eugene and Mary B. Stebinger, and Stebinger placed in the store an electric-light plant, consisting of a boiler and engine, three dynamos, two rheostats, two ampere meters, one volt meter, one lighting dynamo, and the necessary tools, and, having extended a system of wires from the dynamos, furnished electric lights to be used in said hotel and other buildings in the north part of the city. On February 19, 1894, Stebinger, being indebted to the defendants in the sum of \$2,780, on account of rent of the premises up to the first day of the next month, executed to them a chattel mortgage on certain property in the hotel, to secure the payment of the amount so due, and on April 4 of that year executed the mortgage above mentioned to plaintiff, which includes with other property all the electric-light plant, except the boiler and engine; and,

having made default in the payment of the amount secured by the latter mortgage, the plaintiff attempted to take possession of the mortgaged property and remove it from the store, but, being prevented from so doing by the defendants, instituted this action for the recovery thereof. Counsel for the defendants contend (1) that under the agreement to surrender "all future erections and additions to or upon the same," with the premises, upon a termination of the lease, the title to the property in question, as a matter of law, became vested in their clients, as soon as the machinery was attached to their building; (2) that on April 1, 1894, the rent of the premises being in arrears more than thirty days, and the landlords having thereupon declared a forfeiture of the term, if the machinery be considered as trade fixtures, the termination of the lease vested the title to this property in the defendants; and (3) that the referee having found that in March, 1894, Stebinger surrendered the possession and lease to the defendants, the court erred in setting aside such finding, and making one for itself to the effect that the tenant did not, during that month nor at any time prior thereto, surrender the same to the defendants, nor did they take possession thereof, and for these reasons the judgment should be reversed. We will consider the points contended for in the order of their arrangement.

2. GRAY, C. J., in *Holbrook v. Chamberlin*, 116 Mass. 155 (17 Am. Rep. 146), in construing a similar clause contained in a lease, says: "The right of a tenant to remove trade fixtures may doubtless be qualified by the covenants in the lease. But we are of the opinion that the covenant to deliver up in good order 'all future erections or additions to or upon the premises is limited, in purpose and effect, to new buildings erected or old buildings added to, putting such erections and additions upon the same footing, in respect of the obligation to keep in repair, as the

buildings upon the premises at the time of the execution of the lease; and cannot be extended so as to deprive the tenants of the right to remove trade fixtures, much less personal property, put by them upon the premises during the term.' The harsh doctrine of the common law, in relation to the respective and reciprocal rights, duties, and obligations of a landlord and tenant, has been very much ameliorated by modern adjudications, and it is now universally conceded, in enlightened countries, that the tenant has risen above the relation of a mere vassal to his lord, and now enjoys many privileges heretofore denied him. Among these may be classed the right to remove during the term of his lease all trade fixtures annexed to the demised estate, and, in the absence of any stipulation to the contrary, he may also remove, during the same period, erections and additions made by him upon the premises which hitherto had been considered paramount fixtures. In view of this modern doctrine, as announced in the opinion just quoted, we cannot think the dynamos and other electric-light machinery are to be classed as erections or additions made to or upon the leased premises, and hence the defendants' claim to the same under this clause of the lease is without merit.

3. The proposition that the term was forfeited by reason of the rent being in arrears for more than thirty days is predicated upon the theory that the several installments thereof were payable monthly in advance. The clause of the lease from which it is claimed this fact is made manifest is as follows: "And the said lessee, for himself, executors, and administrators, does hereby covenant to and with the said lessors, their heirs, and assigns, to pay the said rent in monthly payments of \$75 each, the first payment thereof to be made on the 1st day of January, 1892." It will be remembered that the first installment of rent became payable on the first day of the term,

but, there being no contract that the other payments were to be made in advance, can it be said, from an inspection of the lease, that such a construction was contemplated by the parties to it? The rule seems to be well settled that when the lease contains no covenant fixing the time when the rent shall become due, it is payable at the end of the term: *Boyd v. McCombs*, 4 Pa. St. 146; *Garvey v. Dobyns*, 8 Mo. 213; *Ridgley v. Stillwell*, 27 Mo. 128; *Duryee v. Turner*, 20 Mo. App. 34; *Bordman v. Osborn*, 23 Pick. 295; *Dixon v. Nicolls*, 39 Ill. 372 (89 Am. Rep. 312). In *Menough's Appeal*, 5 Watts. & S. 432, premises were leased for one year, no time being specified for the payment of the rent, and in an action to recover the same it was held not to be payable until the end of the term. SERGEANT, J., in rendering the decision of the court, says: "No time being stipulated for the payment of rent, it was by law payable at the end of one year, and not before, rent being in its nature a reditus or return for the enjoyment of the annual profits of the land." In *Holland v. Palser*, 2 Starkie, 161, a house had been demised for a term of twelve calendar months, at the yearly rent of eighty pounds, three months' rent to be paid in advance on taking possession. The tenant having paid the rent for two quarters, an action was brought by the landlord to recover the amount due for the third quarter before it had expired, and the question presented was whether, under the terms of the agreement, the rent for the third quarter had accrued before the action was commenced. Lord ELLENBOROUGH, in deciding the case, held that if it had been intended that each succeeding quarter's rent should be paid in advance, it would have been easy to have said "always paid in advance." So, too, in the case at bar, the intention of the parties must be sought for in their agreement, and, looking to this instrument alone for that purpose, it cannot be said that the rent, except

for the first month of the term, was to be paid in advance. Courts very much dislike, even in actions at law, to enforce forfeitures, and will do so only in cases where the parties have clearly stipulated therefor, or where the character of the property affected by the agreement seems to demand it. Such is the general rule, in view of which we are of the opinion that the rent was not payable in advance, except as to the first installment; and hence the rent for March was not in arrear thirty days on the 4th of the next month, when Stebinger executed the mortgage.

4. This brings us to a consideration of the statute authorizing the trial court to set aside the report of a referee, and find the facts and determine the law itself, and the legal effect of a modification of the findings of the referee: Hill's Code, § 229. It may be admitted that the court's findings of fact, in an action at law tried before it without the intervention of a jury, are binding upon this court, when supported by any evidence (*Hicklin v. McClear*, 18 Or. 126, 22 Pac. 1057); but when the court, upon a conflict in the evidence, sets aside the referee's findings, and makes its own, the question is involved whether any judgment given thereon is subject to review on appeal as to the facts. In *Merchants' Nat. Bank v. Pope*, 19 Or. 35 (26 Pac. 622), THAYER, C. J., in speaking of the power conferred by this section, says: "It authorizes the court to set aside the report of a referee under the same circumstances in which it is authorized to set aside the verdict of a jury and grant a new trial, which it may do when the verdict is against the great weight of evidence." The language here quoted would seem to be a limitation upon the power of the court, prohibiting it from setting aside the findings of a referee except in cases where the conclusions of fact reached by him appear to be against "the great weight of evidence." It is provided by section 229 of our Code

that the conclusions of a referee upon a motion to set aside his report are to be deemed and considered as the verdict of a jury, and the statute prescribes the causes which, on the motion of the party aggrieved, authorize the court to set aside the verdict of a jury and grant a new trial: Code, § 235. From this it would appear that the power of the court to set aside the findings of a referee is not limited to a question as to the sufficiency of the evidence to justify the conclusion reached by him, but, in our judgment, extends to all the causes prescribed by the statute for setting a verdict aside; and, if the referee's findings were, by statute, made special verdicts upon the issue, instead of being deemed and considered as such, the power of the court to set them aside could not be questioned, and its action in doing so would not be reviewed on appeal, except for an abuse of discretion; and hence the question is narrowed to a consideration of the legal effect of the court's modification of a referee's finding. If the court, upon setting aside such a report, took the evidence anew, and found therefrom the facts, and determined the law itself, a judgment given thereon, supported by any evidence, ought not, on principle, to be subject to review on the facts; but when the court, from a mere examination of the evidence taken and reported by the referee, reaches a conclusion different from that officer, it may be conceded that the variance is not the result of superior advantages possessed by the court, for it does not possess the opportunity afforded the referee of seeing the witnesses as they appeared upon the stand, or of observing their tone, manner, and bearing while giving their testimony. It might appear to us, from the examination of a bill of exceptions, that the findings of fact made by the trial court were opposed by the great weight of evidence, yet by reason of its intimate knowledge of the parties, and its ability to note the peculiarities of the wit-

nesses, which can never by any means be made a part of the record, its conclusions of fact must necessarily be presumed to have been carefully reached. It is the application of this rule that prompts the trial court to affirm the report of a referee, although it might have reached a different conclusion from an examination of the evidence reported; but to say that the findings of fact made by a referee are entitled to greater consideration than the conclusions reached by the trial court, after an examination of the evidence, is to concede that, while the court possesses power to set aside such report, its action in that respect is nugatory on appeal, unless its findings are supported by a preponderance of the evidence. Such seems to have been the rule adopted in *Merchants' Nat. Bank v. Pope*, 19 Or. 35 (26 Pac. 622), for the learned chief justice, in commenting upon the facts, says: "I have examined the evidence as to the amount of commissions which the said firm was to receive upon the shipment and sales of the oil and fish, and am of the opinion that the Circuit Court very properly made the reduction in the amount found to be due by the referees." The effect of such a rule, if applied to an appeal from a judgment in an action at law in which the court had set aside the findings of a referee, and reached conclusions of its own from a mere inspection of the evidence reported, would be to deprive the findings of the court of all presumptions of regularity which may be invoked in their favor, and the cause would come here for trial de novo, as in equity cases.

5. While we may arrive at conclusions of law different from those reached by the trial court, and thereupon remand the cause for correction in this respect, and with directions to modify the judgment in accordance therewith (*Nodine v. Shirley*, 24 Or. 250, 33 Pac. 379; *Grant v. Paddock*, 30 Or., 47 Pac. 712), we know of no rule permitting this court, in an action at law, to make findings of

fact, or to give a judgment thereon, and hence it is powerless to try such a case de novo. It is true, we may conclude that there is no legal evidence in the record to support the judgment, and for that reason, as a matter of law, reverse it; but, upon doing so, the cause must be remanded for retrial or other proceedings in the court below. Now, since an action at law cannot be tried de novo, it follows that the effect of the rule is not, as it would seem from the opinion in *Merchants' Nat. Bank v. Pope*, and the trial court not only possesses the power to set aside the report of a referee, but upon doing so its findings of fact, although derived from an inspection of the evidence so reported by the referee, is, in our judgment, a new trial by the court, and, as such, the findings so made are entitled to every intendment and presumption that could be invoked in their favor if made upon an original trial by the court. To reach a different conclusion would be equivalent to holding that the trial court, on setting aside the findings of a referee, must hear the testimony, and take the evidence anew, before it could reach a finding of fact of its own; and, as the statute has not prescribed such a mode, we cannot think a procedure of this kind necessary in order to give to the findings and judgment that presumption of regularity to which it is entitled, and must, therefore, hold that the duty of the referee is to advise the court, when so ordered, but that the power appointing him may disregard his counsels, and make its own conclusions from the evidence submitted. Having reached this conclusion, it only remains to be said that, while the evidence is conflicting upon this subject, there is, nevertheless, some testimony that tends to support the court's findings, to the effect that Stebinger has not abandoned the premises, or surrendered his interests in the lease to the defendants, at the time the mortgage was executed; and, as the court further finds that the dynamos and other

machinery are trade fixtures, the removal of which would not injure the freehold or the building thereon to which it is attached, it follows that the judgment is affirmed.

AFFIRMED.

Argued January 6; decided April 5, 1897.

WILLIAMS v. CULVER.

(48 Pac. 365.)

PROMISSORY NOTE—PAYMENT—EVIDENCE.—While there is a presumption that by giving a promissory note all the antecedent demands existing between the parties have been considered and adjusted, and that the amount expressed is the balance due the payee (*Hoyt v. Clarkson*, 23 Or. 51, approved), yet this is not conclusive between the parties, and it may be shown that when the note was executed an unsettled account existed in favor of the maker against the payee, which it was agreed should be credited on the new note when adjusted, and that the account was afterwards adjusted, and the amount due thereon was larger than the amount of the note. Such testimony would not tend to vary the terms of a written instrument, but would show a payment.

From Curry: J. C. FULLERTON, Judge.

Action by Jefferson Williams, Jr., as administrator, against S. J. Culver, on a note. There was judgment for plaintiff on a demurrer to the answer.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. S. H. Hazard*.

For respondent there was a brief and an oral argument by *Mr. J. W. Hamilton*.

Opinion by MR. CHIEF JUSTICE MOORE.

This is an action by Jefferson Williams, Jr., as administrator de bonis non of the estate of P. W. Williams, deceased, to recover the sum of \$863.67, alleged to be due upon a promissory note executed by the defendant to the

deceased, and interest thereon at the rate of ten per cent. per annum from August 19, 1891, and the further sum of \$100 attorney's fees. The defendant, after denying the material allegations of the complaint, alleges, in substance: "That on August 19, 1891, the deceased was the owner and holder of another note executed by the defendant more than six years prior thereto, upon which a number of payments had been made, and against which he had a counterclaim upon an account for work and labor performed for and money paid and advanced to the deceased, under an agreement with the latter that the amount thereof should be deemed a payment upon the old note; and that at the time the new note was executed the amount due the defendant from the deceased had not been settled or agreed upon, nor had any part thereof been credited upon the old note; that, in order to induce the defendant to execute the new note, the deceased represented to him that the amount due on said account could be credited as well upon the new as upon the old note, and that, if the defendant would execute a new note in renewal of the old, the defendant could thereafter make out a statement of the said account, and the amount thereof would be credited by the deceased on the new note as a payment thereon, and that, relying on such representations, he was induced to and did execute the new note. He then further alleges that on September 18, 1891, the defendant, in pursuance of such agreement, made out and sent to the deceased an itemized statement of his demand, whereupon the said account was settled, and it was then agreed that the deceased was indebted to the defendant in the sum of \$906; that the defendant was not indebted to the deceased at the time the new note was given, and the same was executed without consideration, and under a misapprehension of the facts." A demurrer to this answer having been sustained, and the defendant

declining to plead further, the court rendered judgment against him for the amount demanded, from which he appeals.

The question presented by this appeal is whether the new matter alleged in the answer constituted either a defense or a counterclaim to the cause of action stated in the complaint. Counsel for defendant contends that, his client having fully paid the amount due on the old note before giving the new one, there was no consideration for the execution of the latter, and hence the matter pleaded constitutes a defense to the action. The rule is settled in this state that the execution of a promissory note is *prima facie* evidence of an accounting and settlement between the parties of all existing demands, and afford presumptive evidence that at the date of the execution of the instrument the maker owed the payee the amount named therein: *Metasce v. Hughes*, 7 Or. 39; *Hoyt v. Clarkson*, 23 Or. 51 (31 Pac. 198). The new note, having been given in renewal of the old to evidence the amount presumptively due thereon, was supported by a valuable consideration, and, as the defense pleaded would have been availing as a payment upon the old note, the question arises, Why should it not be equally effective when invoked for the same purpose as a defense to the new one? The greatest objection, perhaps, that might be urged against that proposition would probably be that it would convert a defense involving a want of consideration into a plea of payment of a valid instrument; but, waiving this difficulty for the present, we will consider the inquiry suggested, and treat the subject as involving the latter defense. In *Mahan v. Sherman*, 7 Blackf. 378, an action having been brought on a promissory note, the defendant alleged that at the time the instrument was given it was agreed between the parties that an account for work, etc., which the maker held against the payee, should, before the note became

due, be adjusted, and the amount thereof applied in part or full payment of the obligation; but it was held that the defense was unavailing, the court saying: "A verbal contract, contemporaneous with the note, is relied upon to show that the note was not to be paid till a certain account should be adjusted, and the amount credited on the note. That would be making the promise conditional, which, upon its face, is absolute." In that case the maker of the note proposed to show that the payment thereof was dependent upon a settlement of the account between the parties, and, as oral testimony is inadmissible to contradict or vary the terms of a written agreement, the court very properly held that the defense was ineffectual. In *Eaves v. Henderson*, 17 Wend. 190, also an action on a promissory note, the defendant was permitted to prove, over the plaintiff's objection, that at the time the note was executed the payee was indebted to the maker in the sum of \$3.25 on account of goods sold and delivered by the defendant to the plaintiff, under an agreement that the amount should be applied on the note; but it was held, on reversing the judgment, that the evidence was inadmissible, the court saying: "But the difficulty here, in respect to the two small items of articles delivered before the giving of the note, lies in the evidence being a contradiction of the amount expressed in the note." It would seem from this decision that if the maker of a note promised to pay a sum in excess of the amount due on a settlement of accounts with the payee, he could not, in an action on the note, allege or prove that it was agreed at the time the note was given that an account due from the payee to him was to be credited as a payment thereon.

If the rule announced in *Eaves v. Henderson*, 17 Wend. 190, be correct, then the decisions of this court, to the effect that the giving of a promissory note raises only a disputable presumption that all antecedent accounts

existing between the parties have been considered and adjusted, and that the amount expressed in the written promise is the balance found to be due the payee from the maker on such settlement, are erroneous, and should be corrected so as to make the presumption conclusive. Note the effect of such a construction by putting a hypothetical case: A owes \$1,000 on account to B, his father, who, desiring to obtain a short loan, and realizing that his son is not prepared at that time to settle or pay the amount due on the account, executes to A a note for and obtains \$100. Now, to say that this transaction conclusively establishes the settlement of the account between the father and his son would amount to a travesty on justice, and the bare statement of the consequences dependent upon such a conclusion shows its own absurdity. Such irrational deduction cannot on principle be the law applicable to the facts stated in the hypothetical case. The true rule, founded in reason, is correctly enunciated by LORD, C. J., in *Hoyt v. Clarkson*, 23 Or. 51 (31 Pac. 198), in which, speaking for the court, he says: "The presumption is in favor of the correctness of the settlement, and that the note given for the balance ascertained on such settlement expresses the truth. Hence, the general rule that a settled account will not be opened on mere conflicting evidence, and that, when opened, errors or omissions not alleged will not be considered, though there may be some evidence tending to prove them. In such case the party claiming that there were any errors or mistakes must allege them fully and precisely, so as to inform his adversary, and so that issue may be joined upon them." It is true the opinion in that case is predicated upon the assumption that a settlement of the accounts had been made, in the computation of which some items had been inadvertently omitted; and, upon the theory that equity will relieve against mistakes, the court had power to open

and re-examine the account as to the items alleged to have been omitted. But can there be any difference, on principle, between a case in which a mistake is relied upon to correct an error occurring in the settlement of an account, and one in which there had been no settlement whatever, and the maker of a promissory note had intentionally omitted to claim the credit due him from the payee thereof? Taking the hypothetical case to illustrate the answer to this question: If the father, in the case supposed, desiring to give his son \$100, but not having the amount on hand, had manifested his intention in this respect by executing to the object of his bounty a note for that sum, it would not follow that the amount due the father on the account from the son was thereby settled and remitted; nor would the maker of the note be precluded, in an action brought by the son to recover the amount expressed to be due thereon, from showing that the instrument was not supported by a valuable consideration. This is so, because oral testimony is admissible to prove that a written obligation to pay a sum of money was executed without a valuable consideration. Such being the case, an intentional omission of an amount due on an account to the maker of a promissory note from the payee thereof at the date of its execution is equivalent to a lack of consideration *pro tanto*, in view of which we fail to see any valid reason why the rule should not be enlarged so as to permit the admission of evidence to overcome the presumption of the settlement of the account, and to establish a counterclaim for the amount so due as a defense to an action on the note. This would not be varying or contradicting the terms of the written agreement, because, under the very liberal rules of code pleading, with respect to set-offs, such a claim could be interposed as a defense to the action.

In the case at bar, it is alleged that the deceased agreed

to credit on the new note the amount of said account, and that, a statement thereof having been furnished, the account was settled and agreed upon. The facts here alleged would constitute a payment of the note. If the deceased had agreed to give the defendant credit on his note for a given sum in consideration of certain property which was to be delivered to the payee, and the same was surrendered and accepted in pursuance of the agreement, it must be admitted that this would amount to a payment; and, this being so, an account stated must also constitute a payment. "To constitute a payment," says HARRIS, J., in *Kingston Bank v. Gay*, 19 Barb. 459, "money or some other valuable thing must be delivered by the debtor to the creditor, for the purpose of extinguishing the debt, and the creditor must receive it for the same purpose." If there had been no agreement to credit the amount of this account on the note, it would, nevertheless, be permissible to allege and prove the facts relied upon as creating a counterclaim. In the case at bar, however, the defendant, after alleging the facts, states as a conclusion of law that they constitute a want of consideration, instead of a payment, but as a pleading is to be liberally construed in view of the facts alleged, and not entirely upon a statement of the conclusion of law contained therein (Hill's Code, § 106), we think the facts alleged constituted a defense to the action, and that the court erred in sustaining the demurrer, for which reason the judgment is reversed, and the cause remanded for trial.

REVERSED.

Argued March 16, 1896; decided April 5, 1897.

CONNOR v. CLARK.

(48 Pac. 364.)

30	382
31	506
30	382
183	594

JURISDICTION OF SUPREME COURT—APPEAL—CODE, § 2327, SUBD. 3.—

An appeal to the Supreme Court from Crook County having been perfected in September, 1892, the cause would properly have been triable at Salem in October following, under Hill's Code, § 2327, subd. 3, as that was the next session of the court. The parties, however, stipulated to try the case at Pendleton, where the next term was in May, 1893; but, before the session began, made another agreement to hear the case at Salem, and the transcript was filed there after the October term of 1892 had expired. On a motion to dismiss for want of jurisdiction, *held*, (1) that the court at Salem never acquired jurisdiction, as the transcript was not filed there at the next ensuing term after the appeal was perfected, viz., the October term of 1892; (2) that the court at Pendleton never acquired jurisdiction, as the transcript was not filed there at the first term after the appeal had been perfected, viz., the May term, 1893; and (3) that the parties could not by agreement confer jurisdiction on either court, the transcript not having been filed at either place within the statutory time.

From Crook.

Action by Connor Bros. against William S. Clark.
From a decree in favor of plaintiffs, defendant appeals.

DISMISSED.

Mr. E. B. Dufur for the motion to dismiss.

Messrs. S. T. Richardson and G. W. Barnes, contra.

PER CURIAM. This is a motion to dismiss an appeal. The record shows that on March 24, 1892, the plaintiff, Connor Bros., by consideration of the Circuit Court of Crook County, obtained a decree against the defendant, Wm. S. Clark, from which the latter, on September 10, 1892, perfected an appeal by serving and filing a notice thereof, with proof of service, and giving an undertaking therefor, but the transcript was not filed in this court until June 20, 1893. It also appears that at the time the

appeal was perfected, the parties stipulated to try the cause at Pendleton, but on June 4, 1893, they entered into another agreement by which it was stipulated that the appeal should be heard at Salem, and the question is presented whether the transcript was filed within the time prescribed by law. The statute declares that "The transcripts in all appeals taken from Wasco, Crook, or Sherman counties, unless otherwise stipulated by the parties, shall be forwarded to the next succeeding term of said Supreme Court after the appeal shall be perfected, and if said next succeeding term after the perfection of said appeal shall be held at Salem, then the cause shall go to that place for hearing and decision, and the transcript shall be forwarded there by the first day of said term of court, as aforesaid; but, in case the next succeeding term of the Supreme Court after such appeal shall be perfected shall be held at Pendleton, then said cause shall be heard and determined at Pendleton, and such transcript shall be forwarded by the first day of said term at Pendleton": Section 2327, subd. 3, Hill's Code. In appeals taken from a judgment or decree rendered by the Circuit Court in either of these counties, the appellant, upon perfecting his appeal, must forward the transcript to the clerk at the place of holding the next succeeding term of the Supreme Court, but the parties, by agreeing to try the cause at one place, when by statute it is triable at another, thereby stipulate that the next succeeding term of this court shall be other than that prescribed by law. If no agreement had been entered into by the parties, it would have been the duty of the defendant to have filed the transcript at Salem on or before the second day of the October term for 1892, but, having stipulated, at the time the appeal was perfected, that the cause should be tried at Pendleton, it was incumbent upon the appellant to forward a copy of the record to that place by the first Mon-

day in May, 1893. This duty he neglected to perform, and, no order, extending the time within which the transcript was to be filed, having been obtained, this court, on the Tuesday next following the first Monday in May, 1893, lost jurisdiction of the cause; and, such being the case, jurisdiction could not be conferred by the subsequent stipulation of the parties to try the appeal at Salem.

It appears by the affidavits of appellant's counsel that about April 1, 1893, he entered into an agreement with respondent's counsel—and in this respect he is corroborated by the admission of the latter—whereby it was stipulated that the cause should be tried at Salem, though the written memorandum to that effect purports to have been executed June 14, 1893, and this presents the inquiry whether the parties, having once selected the place of trial, different from that prescribed by law, can thereafter change it without filing the transcript at the place agreed upon. If such a change is permissible, and the stipulation was entered into at the time stated in the affidavit, it would necessarily follow that the cause was transferred to Salem before the appellant was in default at Pendleton. The appeal having been perfected September 10, 1892, and the next succeeding term of this court occurring at Salem on the first Monday in October of that year, the transcript should have been forwarded to this place, but, the parties having stipulated that the cause might be tried at Pendleton, exhausted, in our judgment, the power conferred by the statute, and thereafter could not by stipulation transfer the appeal to Salem, or invest the court with jurisdiction of the cause by filing the transcript with the clerk here. If such a proceeding were permissible, then the parties to an appeal might by stipulation entered into at any time prior to the first day of a term of this court transfer a cause from one place to another, and thus keep it in vibratory motion for an indefinite period. We cannot

think the statute contemplates such a transfer, and it follows that the appeal is dismissed.

DISMISSED.

Argued March 31; decided April 12, 1897.

DUNHAM v. HYDE.

(48 Pac. 422.)

MUNICIPAL ELECTIONS—DETERMINATION OF TIE VOTES—CODE, § 2539.—A town charter providing that all laws regulating general elections shall govern elections under the charter does not impose on the town recorder the duty of determining tie votes by lot in town elections, in the manner prescribed for county clerks in county and precinct elections by section 2539 of Hill's Code, since the charter provides neither that the town recorder shall be substituted for the county clerk in the application of the statute to the town, nor that the method of determining ties in county elections shall be adopted, instead of the different method prescribed in legislative elections.

From Coos: J. C. FULLERTON, Judge.

Application by H. W. Dunham for writ of mandamus against W. H. S. Hyde, recorder of the town of Marshfield. The writ was granted, and defendant appeals.

REVERSED.

Messrs. D. L. Watson, Jr., Watson, Beekman & Watson,
and *D. Lowry Watson*, for appellant.

Messrs. J. W. Bennett, John F. Hall, and P. H. D'Arcy
for respondent.

Opinion by MR. JUSTICE BEAN.

This is a mandamus proceeding to compel the defendant, as recorder of the town of Marshfield, to give notice to the petitioner and one Elrod, each of whom received an equal and the highest number of votes for the office of town marshal at the annual election held in December, 1896, requiring them to attend at his office, at a time to

be appointed by him, for the purpose of having their right to the office determined by lot. Upon the filing of the petition, a peremptory writ was issued, and defendant appeals.

It is not claimed by the petitioner that it is made the duty of the defendant by any particular provision of the charter of Marshfield to take the proceedings demanded, but the contention is that it is imposed upon him by section 2539 of Hill's Code, providing the procedure in the case of a tie in an election of county or precinct officers. Section 21 of the town charter of Mashfield provides that "all the laws of this State regulating and governing general elections and proceedings and matters incident thereto shall apply and govern elections under this act, except as herein otherwise provided," and the argument is that by this provision, section 2539 of the Code is incorporated into the charter as though recited in full. But the section referred to is a part of the general laws of the State, providing the time and manner of canvassing the returns and declaring the result of an election for State and County officers, and, since the manner of canvassing the returns and declaring the result of a town election is fully provided for in the charter, it may be well doubted whether the section in question is among the provisions of the general law regulating and governing elections intended to be made a part of the charter by section 21. But, however this may be, the incorporation of the section in the charter would not, it seems to us, extend its scope or operation so as to make it the duty of the recorder, in case of a tie in a city election, to take the same procedure required to be taken by the county clerk in case of a tie in the election of county or precinct officers. To do so would be enlarging by construction the powers and duty of the recorder much beyond the scope of the charter. If section 2539 of the Code is to be read into the charter, it

would seemingly make the county clerk, and not the city recorder, the proper officer to preside over the decision by lot, and declare the result in case of a tie in a town election, if it can be said that a town officer is to be deemed a precinct or county officer within the meaning of that section. Section 21 of the town charter does not purport to impose this duty on the city recorder, or to add to or enlarge his powers or duties in any manner whatever. His duties are specially provided in the charter, and no provision is made for his deciding or participating in the decision or determination of the result in case of a tie in the election of a city officer.

And again, the general laws of the State regulating and governing elections, contain different provisions for deciding a tie vote. Thus, where the vote is a tie on candidates for the legislature, the law requires that a new election be had, while in case of county or precinct officers it is to be decided in accordance with the provisions of section 2539. Now, if section 21 of the charter has the effect contended for, which of these provisions is to apply to the case in hand? It is true a city marshal is not a member of the legislature, neither is he a county or precinct officer, and before either of these provisions can be made to apply to a case like the one before us the courts must do some judicial legislation under the guise of construction. But why pursue this subject further? Enough has been said, we think, to show that the law does not specially enjoin upon the defendant, as a duty resulting from his office, the performance of the act which it is sought to coerce by this proceeding. For these reasons it follows that the judgment of the court below must be reversed, and the cause remanded, with directions to dismiss the petition.

REVERSED.

Argued August 1; decided October 7, 1895.

NORTHERN COUNTIES TRUST v. SEARS.

(41 Pac. 931; 35 L. R. A. 188.)

STATUTES CONSTRUED—CONSTITUTION, ARTICLE IV, § 23.—A statute intended to apply to all the counties of a state, which provides for specified salaries of clerks and sheriffs of all counties in existence when it was introduced in the legislature, and states that these are in lieu of fees previously chargeable, is not rendered special or local, in violation of article IV, § 23, subd. 10, of the State constitution, by failing to provide any salary for those officers in a certain county which was created after the introduction of the bill, but the officers in that county are subject to the law although their salary is not fixed by it: *Manning v. Klippel*, 9 Or. 367, distinguished.

GENERAL APPLICATION OF STATUTE.—The act of February 22, 1893 (Laws 1893, p. 163), which was introduced seven days before, but became a law two days after, the act creating Lincoln County, and which provides that "each of the county clerks of the several counties in this State in which there exists such office shall receive a salary as follows"; that "the sheriffs of the several counties in this State shall receive an annual salary as follows"; that "it shall be the duty of the several clerks of the Circuit and County Courts of this State," etc.—is a general law, the provisions of which the clerk and sheriff of Lincoln County are bound to observe, although following the salary provision is a list of all the counties in the State, except Lincoln, with the amount of salary set opposite each county, and, though the act declares that the salaries "herein provided" for in favor of "said" county clerks and sheriffs shall be audited and paid in a certain manner, and that no one of "such" officials shall receive any other compensation. It is evident from the terms used in the act and from a consideration of the circumstances surrounding its introduction and passage (all which may be considered where the language used is ambiguous or of doubtful import: *Keith v. Quinney*, 1 Or. 364, cited), that this act was intended to be applied to every county in the State.

CONSTITUTIONAL LAW—LOCAL AND SPECIAL LAWS.—The act of February 22, 1893 (Laws 1893, p. 163), fixing the compensation of sheriffs, clerks and recorders, is not unconstitutional as in conflict with the State constitution, article IV, § 23, subd. 10, prohibiting local or special laws for the assessment and collection of taxes—assuming but not deciding that the fees provided by that act are taxes—for the act is applicable to every county in the State; and for the same reason is not in conflict with the State constitution, article IV, § 23, subd. 3, providing that no local law shall be passed regulating the practice in courts of justice.

STATUTORY CONSTRUCTION—FEES OF SHERIFFS.—Since the act of 1893 (Laws 1893, p. 163), as amended in 1895 (Laws 1895, p. 77), the sheriffs throughout the State are not entitled to collect fees except as in that statute provided.

80	888
139	539
30	388
31	423
31	584
30	888
136	64
136	182
136	187

TITLE OF AMENDATORY ACT—CONSTITUTION, ARTICLE IV, § 22.—

Independent acts, designed to accomplish distinct purposes, standing alone and depending on the force of their own provisions to accomplish the desired objects, are not obnoxious to that clause of the State constitution against amending or revising statutes by mere reference to their titles, though their effect may be to amend or modify by implication laws already in force: *Warren v. Crosby*, 24 Or. 558, applied. Within the scope of this rule, the act of 1893 on the subject of fees and salaries of certain officers (Laws 1893, p. 163), is not in conflict with article IV, § 22, State constitution.

SUBJECT OF ACT—CONSTITUTION, ARTICLE IV, § 20.—The act of February 22, 1893 (Laws 1893, p. 163), prescribing the compensation of clerks, recorders, and sheriffs, providing for the appointment of deputies, and for the payment of certain sums by litigants, does not violate article IV, § 20, State constitution, to the effect that every act shall embrace but one subject, since all its provisions are germane to and properly connected with the one general subject of compensation of certain officers.

REVENUE BILLS*—CONSTITUTION, ARTICLE IV, § 18.—A constitutional provision that acts for raising revenue must have their origin in the lower branch of the legislature does not apply to a law providing for the exaction of certain fees from parties to legal proceedings, although these are turned into the treasury and the officers paid by salary. Such a law gives to the person who pays the fees something in return other than is enjoyed by the community at large, and which the person may take or not, at his option; these are not acts for raising revenue.

JUSTICE WITHOUT PURCHASE—CONSTITUTION, ARTICLE I, § 10.—The constitutional provision that "justice shall be administered openly and without purchase" is not violated by a statute requiring payment of certain moderate fees by parties to legal proceedings, although these are turned into the treasury, and the officers paid by salary: *Bailey v. Frush*, 5 Or. 136, cited and applied.

From Multnomah: E. D. SHATTUCK, Judge.

This is a mandamus proceeding by the Northern Counties Investment Trust, Limited, a corporation, against Geo. C. Sears, as sheriff of Multnomah County, to compel him as such officer to serve a summons upon the defendants in a cause pending in the Circuit Court of the State of Oregon for Multnomah County, wherein the Northern Counties Investment Trust, Limited, is plaintiff, and George H. Dedman et al. are defendants. The mileage

*This case is reprinted in 35 L. R. A. 188, with a historical and critical note considering what are such acts for raising revenue as must originate in the lower branch of the legislature.—REPORTER.

fee for the service was paid to the defendant, but he refused to comply with the request of said plaintiff to serve such summons unless other fees were also paid to him in accordance with and as allowed by the act of October 26, 1882. After a full hearing the court below directed a peremptory mandamus to issue, commanding the defendant to forthwith serve the summons and papers in question without further compensation.

AFFIRMED.

For appellant there was a brief by *Messrs. Starr, Thomas & Chamberlain*, and *Julius C. Moreland*, with an oral argument by *Mr. Geo. E. Chamberlain*.

For respondent there was a brief by *Messrs. Snow & McCamant*, and *Milton W. Smith*, with oral arguments by *Messrs. Smith and Wallace McCamant*.

Opinion by MR. JUSTICE WOLVERTON.

The determination of the question brought up by this appeal involves the construction and constitutionality of an act entitled "An act to change in part the compensation and mode of payment thereof to the county clerks, recorders of conveyances, clerks of the Circuit Courts and County Courts in the State, and of the sheriffs of the several counties; to repeal certain provisions of statute providing for the payment of certain fees to said officers, and of trial fees in certain cases; to provide for the payment by parties to appeals, actions, suits, and proceedings of certain sums to assist the State and the several counties in defraying expenses consequent upon the administration of justice; to provide for the appointment of deputies for the various offices above enumerated in certain cases, and for their compensation, and for the payment to the State and several counties of sums of money and fees paid to

said officers by parties litigant," filed in the office of the secretary of state February 22, 1893, and an act amendatory thereof approved February 25, 1895. For the purposes of this inquiry the two acts are essentially the same, and what is predicated of the one might generally be predicated of the other. They will, therefore, be treated as one act, except in so far as it is necessary to note distinctions touching their relative provisions, or the surrounding circumstances attending their adoption. It is contended that the act of February 22, 1893, is unconstitutional because:—First, it is in conflict with article IV, section 23, subdivision 10, of the State constitution, which provides that the legislative assembly shall not pass local or special laws for the assessment and collection of taxes for state, county, township, or road purposes; second, it is a local law "regulating the practice in courts of justice," contrary to article IV, section 23, subdivision 3, of the State constitution; third, it is in violation of article IV, section 22, of the State constitution, which provides that "No act shall ever be revised or amended by mere reference to its title, but the act revised or section amended shall be set forth and published at full length"; fourth, the act treats of several distinct and unconnected subjects, contrary to article IV, section 20, of the State constitution, which provides that "Every act shall embrace but one subject, and matters properly connected therewith, which subjects shall be expressed in the title"; fifth, it is an act for raising revenue, and originated in the senate, in contravention of article IV, section 18, of the State constitution, requiring that bills for raising revenue shall originate in the house of representatives; and sixth, it contravenes article I, section 10, of the State constitution, which requires that "Justice shall be administered openly and without purchase."

The act provides for a fixed salary for the clerks, sheriff, and recorder in each of the counties of the State,

with the exception of Lincoln, and it is claimed that this omission is fatal to the act, under *Manning v. Klippel*, 9 Or. 367. A proper construction of the act will determine whether or not it comes within the doctrine of that case. As to whether or not the fees which the several officers are required to collect and turn over to the county treasurer are taxes, within the meaning of article IV, section 23, subdivision 10, of the constitution, it is unnecessary for the court to decide at the present time. But if it be conceded that they are taxes, within the meaning of that clause, it does not follow that the act is local, and therefore void. Section 1 thereof provides that "Each of the county clerks of the several counties in this State in which there exists such office shall receive a salary as follows," then follows a list containing the names of all the counties except Lincoln, with the amount of the salary set opposite each county in said list. Section 2 relates to clerks of the Circuit and County Courts chosen in counties where such offices exist separate from the office of county clerk. Section 3 relates to recorders of conveyances. Section 4 provides that "The sheriffs of the several counties in this State shall receive an annual salary as follows." Then follows a list of the counties, with the amount of salary set opposite, Lincoln County being omitted. Section 5 provides that "The salaries herein provided for in favor of said county clerks, recorders of conveyances, clerks of the Circuit and County Courts, and sheriffs, shall be audited and paid by the several counties to the respective parties entitled thereto, in monthly payments, and in the same manner that other county charges are paid; and no one of such officials shall be entitled to receive any fees or other compensation for his services than as above provided, and except as hereinafter provided, except for furnishing to private parties copies of the records and files in his office for their benefit and convenience, in which case he shall be

entitled to charge such private parties therefor at the rate of ten cents a folio, but shall not be entitled to anything for authenticating such copies, beyond including the number of words contained in the certificate of authentication in his computation of the number of folios." Section 6 provides, in effect, that "The sheriffs of the several counties in the State shall be entitled to receive the same compensation now allowed by law for the board and keeping of prisoners confined in the county jail of his (their) county." They shall be entitled to any reward offered for the apprehension of persons charged with crime, and to receive from the State the fees now allowed by law for transporting convicts to the penitentiary, and insane and idiotic persons to the asylum. They shall also be entitled to claim from the plaintiff or moving party in any action or proceeding such reasonable sums of money as they may have been compelled to pay or incur on account of the care of property in their custody under attachment, execution, etc.; and where they are required to travel into another county or state to make an arrest or receive a prisoner, they shall receive their actual or necessary expenses incurred. By the amendment of February 25, 1895, three provisions are added, all applicable to counties of more than 50,000 inhabitants, but none other. The first provides for letting the board of prisoners to the lowest bidder; the second requires the payment of fees received from the State for conveying convicts to the penitentiary and insane to the asylum to be paid into the county treasury, and the payment by the county of the actual expenses incurred; and the third is as follows: "Provided further, also, that in counties containing more than 50,000 inhabitants the sheriff shall be entitled to receive all mileage for serving process or papers in civil cases, but shall not receive any mileage in criminal cases whatever, or on executions in civil or criminal cases."

Section 7 provides that the "Coroners of the several counties shall also be entitled to the same fees now allowed for the performance of service in an action, suit, or proceeding where the sheriff is a party, and the party paying the same shall be entitled to recover the amount paid from the adverse party." Section 8 provides that "It shall be the duty of the several clerks of the Circuit and County Courts in the State at the time any suit, action, or proceeding for the enforcement of private rights, including appeals and writs of review, but not proceedings in probate matters, is instituted to exact from the plaintiff or moving party in such suit, action, or proceeding, the sum of \$5. * * * Such clerk shall also, at the time of filing any answer, demurrer, or motion in any such action, suit, or proceeding upon the part of such defendant, exact from such defendant the sum of \$3, * * * and * * * shall also exact from such plaintiff or moving party at the time such suit, action, or proceeding comes on for trial or hearing upon a question of fact or law involved therein, unless referred to a referee, and except upon demurrer, an additional sum of \$12. * * * And every such clerk, upon receiving any money as provided in this section, shall immediately pay the same over to the county treasurer of his county, and take his receipt therefor." The amendment of 1895 enlarges the fees above provided for, where the amount in controversy is above \$500; and reduces the trial fee in all cases to \$2. It also provides for the payment of a fee in probate proceedings. Section 9 provides that "The several sums required to be paid by parties litigant to the respective officials on appeals, actions, suits, and proceedings, as provided for in the two preceding sections of this act, are intended to be in lieu of the fees such parties have heretofore been required to pay said officials in such matters and also in lieu of the trial fee such parties were prior to the adoption of this act

required by law to pay, and no such fees or trial fee last referred to shall be exacted from such parties in such cases. In all other cases, however, in which fees are allowed to county clerks, recorders of conveyances, clerks of the Circuit and County Courts, and sheriffs in civil matters, including fees in probate proceedings, it shall be the duty of the said officials respectively to exact and receive from the parties required by law to pay the same, * * * which fee shall, upon the day it is paid to the official, be paid over by him to the county treasurer of his county." This section, as amended by the act of 1895, reads as follows: "The several sums required to be paid by the parties litigant to the clerk of the Circuit or County Court in appeals, actions, suits, and proceedings as provided for in the two preceding sections of this act, are to be in lieu of all the fees such parties have heretofore been required to pay to clerks, sheriffs, and all other officials in such matters, and the trial fee provided for in the preceding section of this act shall be in lieu of the trial fee such parties were, prior to the adoption of this act, required by law to pay, and no such fees or trial fee last referred to, or any other fee, shall hereinafter be exacted from the parties in any suit, action, or proceeding."

The provisions of this act are thus fully set forth that its scope and purpose may be readily comprehended. In the inquiry as to the intention of the legislature, where the language employed is of doubtful signification or import, we are permitted to consider the surrounding circumstances attending the adoption of the act. "The true meaning of any passage," says Mr. Endlich in his work on Interpretation of Statutes, § 27, "is to be found, not merely in the words of that passage, but in comparing it with every other part of the law, ascertaining also what were the circumstances with reference to which the words were used, and what was the object appearing from those cir-

cumstances, which the legislature had in view, and what were the cause and occasion of the passage of the act, and the purpose intended to be accomplished by it, in the light of the circumstances at the time, and the necessity of its enactment." See also section 28, and *Keith v. Quinney*, 1 Or. 364. The act of 1893 was introduced in the senate on January 11, and the act creating Lincoln County was introduced in the same house January 18, seven days later, but the latter act became a law and took effect two days prior to the passage of the former. However, it is apparent that when the act under consideration was drafted and introduced it provided a salary for the clerk and sheriff of every county in the State, and it is reasonable to suppose that the fact that Lincoln County had been created was overlooked in its final passage, otherwise it would have been added by way of amendment. But, be this as it may, and if connected with the further fact that the legislature amended the act at a subsequent session and again omitted Lincoln County, it is nevertheless manifest that the legislature intended to provide a salary for all the clerks and sheriffs in every county in the State, and the fact only remains that it did not do so. These facts and attendant circumstances are adverted to, not that they will in any event warrant the court in construing the act in the slightest degree different from what the language imports, but because they enable us to ascertain what was meant by the legislature, the language employed by it being ambiguous and of doubtful significance. Were it not for the fact that salaries were fixed for the clerks and sheriffs of all the other counties in the State except Lincoln, and the provisions of section 5, which declare that "the salaries herein provided for in favor of the said county clerks, recorders of conveyances, clerks of the Circuit and County Courts, and sheriffs shall be audited," and "no one of such officials shall be entitled to receive any fees or compensation for

his services than as above provided," which leave the impression that the legislature was dealing with the clerks and sheriffs only in the counties named, and not with the clerks and sheriffs of all the counties in the State, there could scarcely be any question made as to the correct interpretation of the act.

The general tenor of the language employed indicates very clearly that the legislature was dealing with the clerks and sheriffs of all the counties of the State, without excepting any from its purview, which, taken in connection with the evident legislative belief that all were included in the list of salaries affixed, leaves no doubt as to its correct interpretation. To illustrate: Section 1 provides that "each of the county clerks of the several counties in this State in which there exists such office shall receive a salary as follows"; section 4, that "the sheriffs of the several counties in this State shall receive an annual salary as follows"; section 6, that "the sheriffs of the several counties in the State shall be entitled to receive," etc.; and section 8, "It shall be the duty of the several clerks of the Circuit and County Courts in the State." These and other clauses that may be noted all indicate general legislation with the purpose of affecting all clerks and sheriffs of the State alike, and such is the effect of the act. The legislature has simply omitted to fix a salary for the clerk and sheriff of Lincoln County, but they are not less bound to the observance of the provisions of the act than the other clerks and sheriffs of the State. The act is therefore not local, and does not contravene the provisions of subdivision 10, section 23, article IV, of the State constitution. This also disposes of the counsel's second contention, that it is a local law regulating the practice of courts of justice contrary to subdivision 3, section 23, article IV, of our constitution.

Another question in this connection. The view is ad-

vanced that under section 9 the sheriffs in all the counties are required to collect from litigants the fees prescribed by the law of 1882, which formerly obtained for the performance of similar duties. The wording of the first clauses of section 9 is peculiar, and their meaning not entirely clear. They provide that "the several sums required to be paid by parties litigant to the respective officials in appeals, actions, suits, and proceedings, as provided for in the two preceding sections of this act, are intended to be in lieu of the fees such parties have heretofore been required to pay such officials in such matters." The legislature has, however, by the amendatory act furnished us with its own interpretation of these clauses as follows: "The several sums required to be paid by the parties litigant to the clerk of the Circuit or County Court in appeals, actions, suits, and proceedings, as provided for in the two preceding sections of this act, are to be in lieu of all the fees such parties have heretofore been required to pay to clerks, sheriffs, and all other officials in such matters." This is the most reasonable construction of the ambiguous clauses in section 9 of the act of 1893, above referred to, and is but a legislative declaration as to their proper meaning and interpretation. Sheriffs are therefore not required to collect from litigants fees provided for by the act of 1882, except such as the act now under consideration permits and directs.

Does the act of 1893 contravene section 22, article IV. of the State constitution, which provides that "No act shall ever be revised or amended by mere reference to its title, but the act revised or section amended shall be set forth and published at full length"? The purpose and effect of this clause of the constitution has received extended and intelligent consideration at the hands of LORD, C. J., in *Warren v. Crosby*, 24 Or. 558 (34 Pac. 661), a recent case, and, if applicable here, it is decisive of this case. It was there

established that "Statutes not amendatory or revisory in character, but original in form, and complete within themselves, exhibiting on their face their purpose and scope," do not come within the purview of this clause of the constitution, even though they may amend or modify existing laws upon the same subject by implication. The act under consideration in *Warren v. Crosby* had the effect to transfer the power to collect and assess taxes, conferred on the incorporated towns and cities of the State by their respective charters, and also upon the different school districts by law, to the county officers designated therein, and therefore was amendatory by implication of all the city charters of the State, as well as the statutes regulating the assessment and collection of taxes by school districts within the State. It was, however, an independent act, designed to accomplish an independent and distinct purpose, standing and depending alone upon the force of its own provisions for the accomplishment of the object it sought to obtain. Its scope and purposes were distinctly defined and declared within itself, and upon its face it did not seek or purport to revise or amend any known law, and hence it was held to be a valid enactment under the constitution. The act under consideration is of the same nature. True, the title of the act purports to change in part "the compensation, mode of payment," etc., of certain public officers, and "to repeal certain provisions of statute," but the act itself accomplishes the object of its enactment by force of its own terms and provisions, and its scope and purposes are perfectly manifest upon the face of it. It does not purport to revise or amend any section of the statute, or any previous enactment of the legislature, and it is none the less an original and independent act if its extraneous operation does affect other statutes. The limitation imposed by the constitution is not upon the power of the legislature to make laws, but upon the mode in which that

power should be exercised in the enactment of amendatory or revisory laws, and was intended to prevent the amending or revising of existing statutes or previous enactments by substituting one phrase for another, or by inserting a sentence, or by repeating or striking out a sentence or a part of a sentence, which would in and of themselves convey no meaning, but would depend for their operation and effect upon a proper interpolation, substitution, or elimination in comparison with the original statute or enactments: *Warren v. Crosby*, 24 Or. 558 (34 Pac. 661).

It is next contended that "this act provides salaries, levies taxes, and provides for the appointment of deputies, and all three subjects are expressed in the title," and that neither the act nor the title of the act is single, but embraces more than one subject, contrary to the requirements of section 20, article IV, of the constitution above quoted. We are required to look to the body of the act and the provisions therein contained for the ascertainment of the subject-matter. The title is of but little importance, except to index and fairly indicate the subject of legislation. Matters germane to or properly connected with the subject or matters of detail have no place in the title, although the circumstance of their being found there affords no constitutional reason for rendering the act void or inoperative: *People v. McCann*, 16 N. Y. 58 (69 Am. Dec. 645); *State v. Silver*, 9 Nev. 231. The object of this clause of the constitution, so far as the objection here made to the act is concerned, is to prevent the combining of incongruous matters and objects totally distinct and having no connection nor relation with each other in one and the same bill, as well as to discourage improper combinations by the members of the legislature which would secure support for a bill of an omnibus nature with discordant riders attached, which, if acted upon singly, would

neither merit nor receive sufficient support to secure their adoption. In short, as expressed by Mr. Cooley in his work on Constitutional Limitations, § 173, it was "to prevent hodge-podge, or log-rolling legislation." The provisions of the act under consideration tend to but one general object, that is, to prescribe the compensation and duties of county clerks, recorders of conveyances, clerks of the Circuit and County Courts, and sheriffs of the several counties in the State, and they are all germane to and properly connected with this one general head. The act of October 25, 1880, which the court had under consideration in *Manning v. Klippel*, 9 Or. 367, was of the same nature, and similarly entitled; and it was then thought the act was valid under this clause of the constitution. We think the objection of counsel here made is not well taken, and that the act contains but one general subject of legislation.

The next objection made is that the act under consideration is one for raising revenue, and originated in the senate, contrary to the requirements of section 18, article IV, of the State constitution. This proceeds again upon the assumption that the fees which are required to be paid to the officers named in the bill, and which are to be turned into the county treasuries, are taxes. Whether this assumption is right or wrong we do not decide, but, if it be conceded that the assumption is well founded in law, non constat that the act is one for raising revenue. Bills for raising revenue are required to have their origin in the lower branch of the legislature because it is the more numerous of the two bodies, and, being oftener renewed by elections, presumptively it more closely and directly represents the people: Cooley on Constitutional Limitations, § 157. The controlling feature which characterizes bills of this nature, says JOHNSON, J., is that they "impose taxes upon the people, either directly or indirectly, or lay duties, imposts, or excises, for the use of the government,

and give to the persons from whom the money is exacted no equivalent in return, unless in the enjoyment, in common with the rest of the citizens, of the benefit of good government": *United States v. James*, 13 Blatch. 207 (Fed. Cas. 15464). This case was instituted to test the validity of an act of congress increasing the rate of postage upon third-class matter, under the national constitution, providing that "all bills for raising revenue shall originate in the house of representatives," and it was further observed by the court that "a bill regulating postal rates for postal service, provides an equivalent for the money which the citizen may choose voluntarily to pay. He gets the fixed service for the fixed rate, or he lets it alone, as he pleases, and as his own interests dictate," and hence it was concluded that the bill was not one for raising revenue. Mr. Story, in discussing this clause of the national constitution, says "the history of the origin of the power already suggested abundantly proves that it has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may incidentally create revenue": Story on the Constitution, § 880. And this is the trend of subsequent decisions of the national courts touching the construction of this clause of the constitution: See *United States v. Norton*, 91 U. S. 569; *United States v. Hill*, 123 U. S. 684 (8 Sup. Ct. 308); *United States v. Broadhead*, 127 U. S. 212 (8 Sup. Ct. 1194); *The Nashville*, 4 Biss. 188 (Fed. Cas. 10023); and *Dundee Mortgage Co. v. Parrish*, 24 Fed. 200.

In *The Nashville* the court say: "It is certain that the practical construction of the provision by congress has been to confine its operation to bills, the direct and principal object of which has been to raise revenue, and not as including bills out of which money may incidentally go into the treasury, or revenue incidentally arise." DEADY, J., in *Dundee Mortgage Co. v. Parrish*, 24 Fed. 200, says:

"A bill for raising revenue, or a 'money bill' at is was technically called at common law, is a bill levying a tax on all or some of the persons, property, or business of the country, for a public purpose; and the assessment or listing and valuation of the polls or property preliminary thereto, and all laws regulating the same, are merely measures to secure what may be deemed a just or expedient basis for the levying of a tax or raising a revenue thereon." This was predicated of the "mortgage tax" law which formerly prevailed in this State. In *Mumford v. Sewall*, 11 Or. 67 (50 Am. Rep. 562, 4 Pac. 585), which involved an investigation of that law with reference to its validity under the same clause of our State constitution, this court did not feel warranted in declaring it unconstitutional, because it was not sufficiently clear that a law which merely declared that certain property theretofore exempt should thereafter be subject to taxation was strictly a law for raising revenue. Considering the similarity of the state and national constitutions touching bills for raising revenue, and the high and unbroken line of authority upon the proper construction of the latter, it is certainly a very persuasive and weighty argument for applying the same construction to the former. The very cogent reasoning employed undoubtedly has application here, and impels us to the same conclusion touching our own State constitution. A law which requires a fee to be paid to an officer, and finally covered into the treasury of a county, for which the party paying the fee receives some equivalent in return, other than the benefit of good government, which is enjoyed by the whole community, and which the party may pay and obtain the benefits under the law, or let it alone, as he chooses, does not come within the category of an act for raising revenue, and hence the objection made under this clause of the constitution is not well taken.

Lastly, it is contended that the act is in violation of

section 10, article I, of the State constitution, requiring that "justice shall be administered openly and without purchase." The idea of justice as contained in this clause of the constitution was first promulgated by the Magna Charta, and the reasons which led up to the declaration will serve us in construing the clause. In the days of the ancient kings of England, justice was a thing of commerce, and was avowedly bought and sold. The king's court, the supreme judiciary of the kingdom, was open to none who came not with presents to the king. Bribes were openly given for the expedition, delay, suppression, and for the preservation, of justice. The barons of the exchequer, the first nobility of the kingdom, were awarded money in exchange for fair dealing, for preserving liberties under the king's charter, for helping to recover debts, for permission to make defenses, for "free law," and the like. To prevent and overthrow this barbarous and shameless practice of the times, it was stipulated in the Great Charter that "to none will we sell, to none will we deny or delay right or justice": *Harrison v. Willis*, 7 Heisk. 46 (19 Am. Rep. 604). The long-fixed meaning of these words is that the right—attainment of justice—the end of the law—must be administered without sale. Original process must issue without price, except what the law fixes, and without denial, though the defendant be a favorite of the king, or the government who interferes in his behalf, and must be proceeded with by the judges after suit instituted, without delay by themselves, or by order of the king, and that proper judicial process must issue by the judges without fee or reward, except that fixed by the law: *Townsend v. Townsend*, Peck. (Tenn.) 15 (14 Am. Dec. 722). This court has already construed the clause in question in *Bailey v. Frush*, 5 Or. 136. BONHAM, J., speaking for the court, says: "We hold that the language of our constitution * * * means simply that justice

shall not be bought with bribes, nor shall the attendant or incidental expenses of litigation, in the nature of costs and disbursements, be so exorbitant and onerous as to virtually close the doors of courts of justice to those who may have occasion to enter there. In other words, that the rights of the poor man to a redress of his grievances shall be equally respected with those of the rich, and that equal and exact justice shall be dealt out alike to all." The requirements of this act, as they relate to the fees and charges to be paid by litigants and others, do not impinge nor intrench upon the constitution as thus interpreted. These conclusions affirm the judgment of the court below, and it is so ordered.

AFFIRMED.

Decided November 4, 1895.

BAKER CITY v. MURPHY.

(35 L. R. A. 88; 42 Pac. 133.)

30	405
37	386
30	405
40	382
40	563

LIABILITY ON AN OFFICIAL BOND—ANNUAL OFFICE.—The principles and rules of law applicable to the responsibilities of sureties on public official bonds are the same, whether the term of the officer is annual or otherwise.

TENURE OF OFFICE BY PUBLIC OFFICIALS.—Under a constitutional provision that a public officer shall hold his office for a given period, and until his successor is elected and qualified, the term of such a person does not expire until he leaves the office—he continues in office by virtue of the previous election and qualification, and his term is co-extensive with his holding. The same rule applies to persons holding other public official positions under laws containing similar provisions: *State ex rel. v. Simon*, 20 Or. 365; and *Eddy v. Kincaid*, 28 Or. 537, cited and applied.

LIABILITY FOR DEFALCATION OF PUBLIC OFFICIAL WHO IS HOLDING OVER.*—The sureties on the official bond of a city treasurer,

*This case is reprinted in 35 L. R. A. 88, with a valuable note on the Extension of Liability on Official Bonds while the officer is holding over after the expiration of the regular term, showing those cases where the officer is merely holding beyond the term, and those where the bond or some statute provides for a continuance of liability until a successor is appointed. There is also in this note a collection of a few cases on the liability of the sureties after the re-election of the principal. See also 10 Am. St. Rep. 843, for a scholarly monograph on the Liability of Sureties on Successive Bonds.—REPORTER.

elected for one year under a city charter providing that he shall hold office until his successor is elected and qualified, are liable for defalcation of their principal after the expiration of the year, while holding over, pending the election or appointment of his successor.

PLEADING—DEFECTS CURED BY ANSWER.—In an action to recover the amount of a defalcation that occurred after the expiration of the regular term for which the official was elected, and while he was holding over, it perhaps ought to be alleged that the defaulter was not elected his own successor; but where the defendant answered without raising this point, the complaint will be held sufficient where it alleged that the defaulter's term expired on a certain day, but that he contested the election held on that day, and refused to surrender the office for a certain time during which he was a de facto officer: *Willer v. Or. Ry. & Nav. Co.*, 15 Or. 158, cited and applied.

From Baker: JAMES A. FEE, Judge.

Appeal by defendants from a judgment of the Circuit Court for Baker County in favor of plaintiff in an action brought to enforce defendant's liability on bond of the city treasurer, for money alleged to have been misappropriated by him.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Thos. H. Crawford*, urging these points:

It is not disputed the office of city treasurer of Baker City was an annual office, and that it was the duty of the treasurer to receive and keep all money that came to the city, and pay out the same upon warrants duly attested. From this it is clear that whatever money he has on hand at the end of one term he has at the beginning of the next term, and the bondsmen on the second term are liable therefor. Such money both in fact and in contemplation of law came into his possession during the term subsequent to that for which Parker and Rust became Murphy's sureties (i. e., subsequent to November 6, 1893, when his term of office expired), and for the loss of funds after that date they are not liable. In this case the loss occurred between

November 6 and his resignation on December 19: *Tyler v. Nelson*, 14 Gratt. 214; *Bryan v. United States*, 1 Black 140; *Hewitt v. State*, 14 Am. Dec. 259.

Where moneys which have been collected during the first term of an office remain in the custody of the officer when he enters upon the discharge of his duties for the second term, the sureties for the latter term immediately become answerable therefor, and those for the former term are relieved from further liability: *Board of Education v. Fonda*, 77 N. Y. 350; *State v. Van Pelt*, 1 Ind. 304; *Morley v. Town of Metamora*, 78 Ill. 394 (20 Am. Rep. 360); *Moore v. Madison Co.*, 38 Ala. 670.

When sureties are held answerable for moneys converted by the principal during a subsequent term of office, it is always upon the ground that as to such moneys he is simply continuing to discharge the duties of the former term: *Crawn v. Commonwealth*, 10 Am. St. Rep. 845, and note.

The sureties on the official bond of an officer appointed or elected annually are liable only for his official acts during the year, and although the words of condition in the bond are general, yet the liability of the sureties on the bond cannot be extended beyond the year: 2 Am. & Eng. Enc. Law (1st Ed.), 466; *Moss v. State*, 10 Mo. 338 (47 Am. Dec. 116); *Chelmsford Co. v. Demarest*, 7 Gray, 1; *Bigelow v. Bridge*, 8 Mass. 275; *Welch v. Seymour*, 28 Conn. 387; *County of Wappello v. Bingham*, 10 Iowa, 40 (74 Am. Dec. 370); *Dover v. Twombly*, 42 N. H. 59; *State Treasurer v. Mann*, 34 Vt. 371; *Mayor v. Crowell*, 40 N. J. L. 207 (29 Am. Rep. 224); *Citizens' Loan Assn. v. Nugent*, 40 N. J. L. 215; *Mayor v. Horn*, 2 Harr. (Del.) 190; *Johnson v. McCord*, 10 Am. Dec. 644; *Committee v. Greenwood*, 1 Desau. 450; *Kingston Insurance Co. v. Clark*, 33 Barb. 196; *Patterson v. Inhabitants of Freehold*, 38 N. J. L. 255; *Harris v.*

Babbitt, 4 Myers, Fed. Dec. 588; *Mutual Loan Assn. v. Price*, 26 Am. Rep. 703.

For respondent there was a brief and an oral argument by *Messrs. Frank L. Moore and Will R. King*.

Opinion by MR. JUSTICE WOLVERTON.

This is an action to recover upon the official bond of the defendant S. F. Murphy as treasurer of Baker City. The defendants J. H. Parker and Henry Rust are his sureties upon the bond. Murphy was duly elected treasurer at the regular annual election of the city November 7, 1892; and, having filed his oath of office, he executed and filed the bond in question on the 25th day of April, 1893, the condition of which is that the said S. F. Murphy "shall honestly and faithfully discharge his duties as treasurer of Baker City during his continuance in such office." This bond was executed and delivered in pursuance of an ordinance of the city adopted January 7, 1891, requiring the treasurer to execute an official undertaking to plaintiff. The complaint alleges, among other things: "That on the 25th day of April, 1893, said S. F. Murphy duly entered upon the duties of his said office, and continued to act by virtue of said election until the 19th day of December, 1893; that the term of office of the said S. F. Murphy expired on the 6th day of November, 1893, but that said Murphy contested the election held on said date, and retained possession of all the property of said office, and refused to deliver the same, and was the de facto treasurer of said city until the 19th day of December, 1893, when the said Murphy resigned all his right, title, and interest to said office. * * * That on and between the 30th day of April, 1893, and the 7th day of November, 1893, the said S. F. Murphy received various sums of money as such

treasurer, amounting to the sum of \$16,219.14, said moneys being the property of plaintiff; that said Murphy failed, neglected, and refused to honestly and faithfully discharge the duties as such treasurer, and violated the terms of his said bond in this, that said S. F. Murphy fraudulently and in breach of the terms of his said bond failed and neglected to turn over to the plaintiff or to his successor in office the said sum of \$16,219.14, or any part thereof, except the sum of \$11,050.82, and has converted and appropriated to his own use the said sum of \$4,119.59."

The defendants, by their answer, among other things, "deny that said S. F. Murphy continued to act by virtue of his said election until the 19th day of December, 1893, or at any time after the 6th day of November, 1893, at which time his said term of office expired, and he succeeded himself as the alleged de facto treasurer of said Baker City; admit that the term of office of the said S. F. Murphy expired on the 6th day of November, 1893, but deny any knowledge or information as to whether Murphy contested the election held on said date; admit that the said Murphy retained possession of all the property of said office, and refused to deliver the same, and aver his retention of said property and his refusal to deliver the same was based upon a valid claim that he was at said time (November 6, 1893) elected his own successor in said office"; and "admit that the said S. F. Murphy was the de facto treasurer of said city, at least, if not the duly elected treasurer, on and between the 7th day of November, 1893, and the 19th day of December, 1893; and defendants aver the fact to be that said plaintiff, Baker City, its mayor, and common council, acknowledged said Murphy and held him out to the world and these defendants as its duly elected, qualified, and acting treasurer on and between said dates, and as his own successor of, in, and

to said office." The affirmative allegations of the answer were put in issue by the reply.

This recital of the pleadings is sufficient for a fair understanding of the questions arising thereunder. The bill of exceptions does not disclose whether any evidence was offered to show that Murphy was re-elected as city treasurer November 6, 1893, or that the city or its authorities ever subsequently treated or dealt with him as having entered upon a second term; it does disclose evidence, however, tending to show that on November 4, 1893, he filed his official report, which was referred back to him by the city council for the purpose of having it made more definite and certain, and was afterwards, in December, 1893, handed to the finance committee, who were charged with the duty of procuring a settlement with him in behalf of the city. In the performance of this duty the committee made demand upon Murphy about December 23, 1893, for the funds then in his hands, and received from him the sum of \$1,025 in money and \$20 in warrants. The balance he refused to pay. Subsequently his successor, J. W. Wisdom, who was appointed treasurer December 19, 1893, made a like demand upon him in January, 1894, but payment was refused. The evidence further tends to show that, prior to November 6, 1893, Murphy received most, if not all, the funds alleged to have been misappropriated, and there is some evidence tending to show that he had the larger portion of it on hand at that date, and subsequent thereto, and some of it as late as December 16, 1893. A trial being had before a jury resulted in a verdict and judgment in favor of plaintiff for the amount demanded.

This record, together with the instructions of the court to the jury, present the question whether the sureties upon the official bond of a public officer elected for a term of one year, under a city charter providing that he

"shall hold his office until his successor is elected and qualified," can be held for defalcations of the principal occurring subsequent to the end of the year, while holding over pending the election or appointment of his successor. It is contended, first, that this is an annual office, and that the sureties upon the bond of an officer elected to fill such an office are liable only for his official acts during the year, although under statutory provisions he is entitled to hold over until his successor is elected and qualified. It may be said of any office having a fixed term of one year, and which, in contemplation of law, is to be filled by appointment or election annually, that it is an annual office: *Harris v. Babbitt*, 4 Dill. 190; *Sparks v. Farmers' Bank*, 3 Del. Ch. 289. But it is not apparent why an annual office, public in its nature, is not governed by the same principles and the same rules of law, touching the obligations and liabilities or sureties upon the bonds of incumbents, as any other public office. We have found in the books no reason or authority for any distinction, and we believe none exists. The laws and ordinances governing the length of the term, the expiration thereof, the commencement of a succeeding term, and the duties and responsibilities of incumbents, are construed by the same rules of interpretation, whether they apply to an annual office, public in its nature, or any other public office having a longer term, so that the responsibilities of sureties upon the bond of an officer filling an annual office are the same as if they stood sponsor by written obligation for the faithful performance of the duties of any other public officer.

It is a well-settled rule of law, recognized generally, if not by all the authorities, that bonds or obligations given to secure the performance of official duties are to be construed with reference to the term for which the incumbent is elected or appointed; and it is equally well settled that

the law governing as to the term, its time of commencement and expiration, and the conditions and contingencies upon which it shall begin, continue, and come to an end, enters into and forms a part of such bonds or obligations, where general language is used in stipulating the conditions. Sureties upon such undertakings are presumed to have known the duration of the term when they became parties to them, and to have intended to bind themselves to the extent and for and during the time that their principals are bound. It is only upon the application of the rule to statutory enactments governing the tenure of office that the authorities appear to part company: *Welch v. Seymour*, 28 Conn. 393; *Kitson v. Julian*, 24 Law Jour. (Q. B.) 204; *County of Wapello v. Bigham*, 10 Iowa, 42 (74 Am. Dec. 370); *State Treasurer v. Mann*, 34 Vt. 371 (80 Am. Dec. 688); *Liverpool Water Works Co. v. Atkinson*, 6 East. 511; *Wardens of St. Saviour's v. Bostock*, 5 Bos. & Pul. 179; *Lord Arlington v. Merricke*, 2 Wms. Saund. 412; *Hassell v. Long*, 2 Maule. & S. 368; *Savings Bank of Hannibal v. Hunt*, 72 Mo. 557 (34 Am. Rep. 449); *Thompson v. State*, 37 Miss. 522; *State ex rel. v. Berg*, 50 Ind. 496; *Sparks v. Farmers' Bank*, 3 Del. Ch. 300; *Riddel v. School District*, 15 Kan. 168; *Mayor of Rahway v. Crowell*, 40 N. J. Law, 207 (29 Am. Rep. 234); *State v. Crooks*, 7 Ohio (Pt. 2), 221; *County of Scott v. Ring*, 29 Minn. 401 (13 N. W. 181). Considered in the light of this rule of interpretation, did S. F. Murphy's term of office as city treasurer come to an end November 6, 1893? If it did, if it expired absolutely upon that date, then his acts thereafter were *functus officio*, in so far, at least, as they could have any binding force and effect touching the liabilities of the sureties upon his official bond.

In the State constitution (Art. XV, § 1), it is provided that "All officers—except members of the legislative assembly—shall hold their offices until their successors are

elected and qualified." Under this section and the provisions of an act regulating the election of railroad commissioners wherein the term of office was fixed at two years, "and until their successors are elected and qualified," it has been recently held by this court (*Eddy v. Kincaid*, 28 Or. 537, 41 Pac. 156), that such commissioners were entitled both to the office and the emoluments thereof while holding over after the expiration of the two years' term; the legislature having failed to elect their successors. And in *State ex rel. v. Simon*, 20 Or. 365 (26 Pac. 170), BEAN, J., says: "But, whatever the rule at common law may have been, it is clear that when by the constitution or law officers are elected or appointed for a term, and until their successors are elected and qualified, they are thereby authorized to hold and exercise their offices until their successors are duly elected or appointed under some existing provision of law." So that the law may be considered as settled that state officers holding over under the constitution or under an act of the legislature entitling them to hold "until their successors are elected and qualified," unless otherwise restricted, are entitled both to the office and the emoluments appurtenant thereto. The charter of Baker City was accorded to it by the legislature. By its provisions (section 9), it is enacted that "The treasurer shall be elected for one year by the qualified voters of Baker City at each general election as hereinafter provided, and shall hold his office until his successor is elected and qualified." While this is not a state office, the legislature has provided that the treasurer shall hold until his successor is elected and qualified, which it had the undoubted right and authority to do; and, by a parity of reasoning, the tenure of office must be governed by this express provision.

Can it be said, then, that the treasurer's term of office had come to an end on the 6th day of November, 1893?

And in what respect can it be said that his subsequent acts are *functus officio* while holding over pending the election and qualification of a successor? In *State ex rel. v. Berg*, 50 Ind. 501, the court say: "Under the constitution, as well as under the law fixing the term of Berg's office, it is clear that he was entitled to hold the office, not only for the year, but until his successor was elected and qualified. As long as he continued in the office, his successor not having been elected and qualified, he was such officer, not *de facto* merely, but *de jure*. The constitution and law under which he was elected, enacted in pursuance of the constitution, made him such." The conclusion reached here is based, it is true, upon the constitutional as well as the statutory provision on the subject, but it is a direct adjudication as to the tenure of the office. *State ex rel. v. Smith*, 87 Mo. 158, is a case much in point, with the constitutional element eliminated, and arose under the provisions of the charter of the City of St. Louis. BLACK, J., in delivering the opinion of the court says: "It is true, the law by which the relator was appointed fixed the term of office at four years, and contemplates that at the expiration of that time a new appointment will be made, but the same law also contemplates that the appointing power may not be promptly exercised, and to prevent a vacancy the incumbent is made to hold over until such appointment is made. This is a contingency contemplated by the law, and enters into every such appointment, and the time he holds over the designated period is as much a part of the term of his office as that which precedes the date at which the new appointment should be made. We have seen this is so for all purposes of holding the office, and in suits against the officer and his sureties on his official bond, and it must also be true with respect to the emoluments of the office." See also *Savings Bank of Han-*

nibal v. Hunt, 72 Mo. 597 (37 Am. Rep. 449); *Long v. Seay*, 72 Mo. 648; and *State v. Kurtzeborn*, 78 Mo. 99.

In *State v. Sullivan*, 45 Minn. 309 (11 L. R. A. 272, 22 Am. St. Rep. 729, 47 N. W. 802), it is held, that "the incumbent of an office, the term of which is for a specified period, 'and until his successor is elected and qualified,' is entitled to retain the office after the lapse of the specified period, in the event of the election of another person to succeed him who is ineligible." See also, in support of this doctrine, *State v. Benedict*, 15 Minn. 198; and *People v. Tilton*, 37 Cal. 614. And if no vacancy occurs the incumbent's term must be continuous. In *State v. Howe*, 25 Ohio St. 597 (18 Am. Rep. 321), it is held that an incumbent so holding over after the technical term is in office *de jure*; but it was there thought that the time intervening between the expiration of the period fixed by the statute and the election and qualification of a successor was not a part of the preceding term, and that the holding over was *pro tempore*. In other cases it is held that the holding over is but an occupancy of that proportion of the successor's term. See *Riddel v. School District*, 15 Kan. 170. One thing, however, is palpably manifest, that the right to hold over is by virtue of the previous appointment or election and qualification; it is a right accorded by statutes regulating the tenure of office. The holding does not come to an end on the day of the expiration of the statutory period, unless there comes a duly elected and qualified officer to cut it off, or unless his recognized successor is inducted into the office. In one sense, the holding over is *pro tempore*, because the time of the holding is dependent upon the election or appointment of a successor; and in another it may be considered as the occupancy of a successor's term, which is shortened by that length of time. But the holding for the technical term and the holding over is a recognized right arising from one

appointment or one election. The tenure of office is indivisible. It cannot be considered as a broken term, or as a double term; it is one continuous holding; and the holding over, abiding the election of a successor, it seems to us, is as much a part of the term of office as that which precedes it, and the interpretation of the bond in question must be governed accordingly. The city charter provides (section 24), that "Every person elected to office under this act shall qualify by taking and filing with the auditor within ten days from his election, an oath of office"; and it is contended for this provision that a failure or refusal to thus qualify within ten days has the effect to vacate the office. However this may be, the clause in question has reference to the officer-elect, and not to an incumbent who has already qualified, and is holding over the particular term. There is no provision in the charter requiring an officer holding over pending the election of his successor, to requalify; if there is, our attention has not been called to it. He continues in office by virtue of his previous election and qualification, and the term is co-extensive with his holding in that capacity. In coming to this conclusion, we have not been unmindful of the rule that the contracts of sureties are to receive a strict construction, and that they ought not to be bound except by the letter of their undertaking. As bearing upon the foregoing conclusions, we cite also: *Badger v. United States*, 93 U. S. 599; *State ex rel. v. Saxon*, 25 Fla. 792 (6 So. 858); *Placer Co. v. Dickerson*, 45 Cal. 12; *Mayor of Cuthbert v. Brooks*, 49 Ga. 179; *Kimberlin v. State*, 133 Ind. 696 (14 L. R. A. 858, 29 N. E. 776); *People v. Beach*, 77 Ill. 52.

• Nor is *King County v. Ferry*, 5 Wash. 536 (19 L. R. A. 500, 34 Am. St. Rep. 880, 33 Pac. 538), opposed to this view. There the legislature enlarged or extended the term after the execution of the bond. This was held, and correctly, too, to be an impairment of the sureties' con-

tract; for at the time of assuming the obligation they could not have had in mind the extended period which the legislature afterwards saw fit to add to the term fixed by law, and did not engage to become responsible for the acts of their principal during the added period. Mr. Throop, in his work on Public Officers (§ 213), says: "But, whatever may be the true rule, in the case of a wrongful holding over, the weight of American authority sustains the proposition, that where an officer holds over rightfully, that is, pursuant to a statute providing that he shall hold over until his successor shall be chosen, or shall be chosen and qualified, this constitutes one of the exceptions to the rule that the liability of the sureties in an official bond does not extend beyond the principal's term, and that the sureties are liable for his defaults during the additional time." See also in this connection *Thompson v. State*, 37 Miss. 522; and *State v. Wells*, 8 Nev. 105. And this view has been adopted in *Eddy v. Kincaid*, 28 Or. 537 (41 Pac. 156). But whether considered as an exception or as the rule itself, it can only be sustained upon the principle that the holding over is a continuation of the term, and, together with the technical term, constitutes one and the same term.

Many authorities are cited by counsel for appellant, of which *Chelmsford Company v. Demarest*, 7 Gray, 1, is the leading case, in support of the contention that the sureties are not held beyond the particular term. But it will be found, upon an examination of these authorities, that they nearly all consist of cases where the incumbents have been re-elected or re-appointed to the same office, and the authorities have permitted them to continue in office without again qualifying. In such a case it is the duty of the authorities to require the incumbent to requalify, and upon his failure or refusal to comply with the requirement to declare the office vacant, failing in which the

sureties are not bound beyond the term, or, as some of the authorities say, a reasonable time thereafter. See in this connection *Rany v. Governor*, 4 Blackf. 5. The case is the same as if one officer succeeds another by election or appointment and is inducted into the office without qualifying. The former term lapses and the new one begins with an incumbent without sureties for the due and faithful observance of his duties. These authorities are without relevancy here. The instruction of the court to the jury touching the liability of the sureties was, in effect, that they were liable upon the bond for the acts of the principal from the time of the execution thereof to the 6th day of November, 1893, and for a reasonable length of time thereafter. This instruction was fully as favorable to the defendants as they had a right to expect under the law.

Objections were made by defendants at the trial to the introduction of all the testimony, as it was offered, upon the ground that the complaint does not state facts sufficient to constitute a cause of action, and it is contended that the complaint is faulty in that it contains no direct allegation that the defendant was not elected his own successor. If tested by a demurrer, we are not sure but this would have been a vital objection: *Thompson v. State*, 37 Miss. 522. But the defendants have answered over, and the objection is taken for the first time at the trial. In such a case the pleadings will receive a liberal construction, to the end that the case may be permitted to go to the jury upon the merits. THAYER, J., in *Specht v. Allen*, 12 Or. 122 (6 Pac. 494), says, "that a party in such a case should be compelled to resort to a motion for judgment notwithstanding the verdict, in case one were to be rendered against him, as the party interposing the pleading ought, when it had not been demurred to, to be entitled to the presumption a verdict in his favor would afford."

See also *Dickinson v. Duston*, 21 Mich. 563; and *Kean v. Mitchell*, 13 Mich. 211. The complaint alleges "that on the 25th day of April, 1893, said S. F. Murphy duly entered upon the duties of his said office, and continued to act by virtue of said election until the 19th day of December, 1893. That the term of office of the said S. F. Murphy expired on the 6th day of November, 1893, but that said Murphy contested the election held on said date, and retained possession of all the property of said office, and refused to deliver the same, and was the de facto treasurer of said city until the 19th day of December, 1893, when the said Murphy resigned all right and title to said office." We think it may be inferentially deduced from these allegations that Murphy was not elected his own successor, and that the complaint is sufficient after verdict. STRAHAN, J., says: "After verdict, if there are any allegations in the complaint under which evidence might have been introduced which would have justified the verdict, we are bound to presume that it was introduced, and that the verdict is based thereon": *Willer v. Oregon Ry. & Nav. Co.*, 15 Or. 158 (13 Pac. 768). So that, upon the case made by the pleadings, and the presumption that prevails in support of the findings of a jury, we are not disposed to disturb the verdict, and, no error appearing upon the record, the judgment of the court below is affirmed.

AFFIRMED.

Decided at Pendleton, July 18, 1896.

BANK OF IDAHO v. MALHEUR CO.

(45 Pac. 781; 35 L. R. A. 142.)

1. **MECHANICS' LIENS—BRIDGES—EXECUTION.**—Property exempt from sale on execution is not subject to mechanics' liens, unless the law conferring the special remedy so declares; thus, a bridge that is part of a public highway, not being liable to judicial sale, is not subject to mechanics' liens, and this though Hill's Code, § 3669, mentions bridges in the enumeration of property subject to such liens. In the absence of the word "public" the statute will be presumed to apply only to private bridges.
2. **MECHANICS' LIENS ON PUBLIC BRIDGES*—EXEMPTION—PUBLIC POLICY.**—No lien for material can attach to a county bridge, either before or after its acceptance, for, under sections 3669 and 3670, Hill's Code, the lien would attach to the land on which the bridge is constructed, and this, not being subject to execution (Hill's Code, § 282, subd. 6), is not subject to a lien. Furthermore, the bridge is public property, and exempt from mechanics' liens on grounds of public policy: *Portland Lumbering Co. v. School Dist. No. 1*, 13 Or. 283, approved and followed.
3. **POWERS OF COUNTY COURTS.**—County Courts, being of special and limited jurisdiction, have only those powers conferred by statute (*Wren v. Fargo*, 2 Or. 19; and *Kelly v. Multnomah County*, 18 Or. 356, cited and applied), and cannot pay off or take assignments of claims against creditors of the county, so as to succeed to the rights of such creditors.

From Malheur: MORTON D. CLIFFORD, Judge.

This is an action to recover an alleged balance claimed to be due on a chose in action assigned to plaintiff, The First National Bank of Idaho. The facts are that on July 6, 1894, the defendant entered into a contract with the

*NOTE.—This case is reprinted in 35 L. R. A. 142, with a valuable collection of authorities showing the law regarding Mechanics' Liens on Public Property. In California public buildings are not subject to liens: *Mayrhofer v. Board of Education*, 23 Am. St. Rep. 451, and note. The property of quasi public corporations, such as electric light or water companies operating under municipal franchises, may be subjected to liens for supplies or labor: *Badger Lumber Co. v. Maries Water Co.*, 30 Am. St. Rep. 306. This subject is thoroughly reviewed in the case of *National Foundry v. Oconto Water Co.* (Wis.), 52 Fed. 43 (S. C. 59, Fed. 19), where a lien was enforced against the entire pipe lines and pumping works of a company organized for and actually engaged in supplying water to a city.—REPORTER.

Bullen Bridge Company, a corporation, by the terms of which the latter, in consideration of the payment of \$2,000, and the agreement to pay \$2,000 at the next term of the County Court after the completion and acceptance thereof, constructed a bridge for the defendant over the Malheur River near the town of Vale; that on December 5 of said year the company assigned its claim for the \$2,000 deferred payment to the plaintiff, and requested the defendant to pay the same to its assignee when it became due; that on February 2, 1895, and before the bridge had been accepted, the material men, and laborers, who had furnished material for and performed labor in its construction, claimed liens thereon, and filed notices of their respective claims in the office of the clerk of said county, amounting in the aggregate to \$1,469.76; that on March 7, the bridge having been accepted, the defendant paid to said laborers and material men the amount of their respective claims, took an assignment of their alleged liens, and on May 8 paid to the plaintiff \$530.24, as the balance due under the contract, whereupon this action was brought to recover the amount so paid to the laborers and material men. The defendant, after denying the material allegations of the complaint, alleges, in substance, that, having an equitable interest in the bridge by reason of the payment of \$2,000, it was compelled to and did pay the said claims for material and labor to prevent the threatened foreclosure of the liens so claimed therefor, and the sale of its interest in the bridge. It is also alleged that on January 24, 1895, the plaintiff being cognizant that the laborers and material men had not been paid, and as the agent and claiming to be the assignee of the Bullen Bridge Company, requested the defendant to hold a sufficient amount of the balance due under the contract for the payment of and to satisfy said claims, until the Bullen Bridge Company should pay the same; that neither the

Bullen Bridge Company nor the plaintiff has ever paid any part of the amount so due the lien claimants, and, after waiting a reasonable time therefor, the defendant was compelled to and did settle and discharge said liens, and paid to the plaintiff, prior to the commencement of this action, the balance due under the contract; and that, by reason of the premises and of the facts hereinbefore stated, the plaintiff is estopped from claiming any money as due under the contract, and from maintaining this action. A motion and demurrer filed by plaintiff having been overruled and denied, it filed a reply denying that said bridge was subject to any mechanics' liens, and putting in issue the other allegations of new matter contained in the answer, and upon the issue thus joined a trial was had, resulting in a verdict and judgment for the defendant, from which judgment the plaintiff appeals.

REVERSED.

For appellant there was a brief by *Messrs. John T. Morrison, Geo. H. Stewart, and King & Saxton*, with an oral argument by *Mr. Stewart*.

No appearance or brief for respondent.

MR. JUSTICE MOORE, after stating the facts in the foregoing language, delivered the opinion of the court.

1. The plaintiff's counsel contends that the bridge was the property of Malheur County, and as such was not subject to mechanics' liens, and that the court erred in admitting the claims therefor in evidence. If it be conceded that the county, at the time the notices of lien were filed, was the owner of the bridge, no lien could possibly attach thereto; for the mode of enforcing this statutory remedy is by sale upon execution (Hill's Code, § 3677), and the statute expressly provides that all county

property shall be exempt from such judicial process: Code, § 282, subd. 6. The duty of maintaining highways devolves upon the state in its sovereign capacity, but is delegated in part to the several counties therein, which are authorized by law, as trustees for the public, to levy and collect taxes to be expended in the performance of the duty thrust upon them. A public bridge is a part of the highway, and, whether constructed by the state or any of its public corporations, is held in trust for a public use, and the statute, emphasizing a rule of public policy, wisely prohibits the sale of such property upon execution. The reason assigned for the existence of this rule, in the absence of a statute upon the subject, is that if the property held by a municipal corporation in trust for the public were subject to sale upon execution, the title thereto might become vested in a private person, thereby depriving the public of its right to the use of such property, and public policy forbids that the public shall be deprived even temporarily of such use: *Leonard v. City of Brooklyn*, 71 N. Y. 498 (27 Am. Rep. 80); *Portland Lum. & Mfg. Co. v. School District No. 1*, 13 Or. 283 (10 Pac. 350). The rule is well settled that property which is exempt from sale under execution, upon grounds of public policy, is not within the operation of or subject to the mechanics' lien law, unless the statute conferring this special remedy so expressly declares: *Williams v. Controllers*, 18 Pa. St. 275; *National Lundry & Pipe Works v. Oconto Water Co.*, 52 Fed. 43; *Whiting v. Story Co.*, 54 Iowa, 81 (6 N. W. 137, 37 Am. Rep. 189); *Ripley v. Gage Co.*, 3 Neb. 397. Judge Dillon, in his work on Municipal Corporations (3d Ed.), § 577, in stating this rule says: "Property owned by a municipal corporation and used for public purposes cannot be sold by virtue of an execution issued on a judgment rendered against the corporation. As one of the results of this general rule, there can be no

mechanics' lien against such property. Thus, county bridges, schoolhouses, courthouses, and other public buildings which cannot be sold under an execution cannot be sold on foreclosure of a mechanics' lien; it is only such property as can be sold under judicial process that is subject to such liens." In *Board of Commissioners v. Norrington*, 82 Ind. 190, it is held that public policy forbids either the acquisition or enforcement of a mechanics' lien against a public bridge. So, too, in *Loring v. Small*, 50 Iowa, 271 (32 Am. Rep. 136), which was a suit to enforce a mechanics' lien against a bridge constructed for a county, DAY, J., in rendering the decision of the court says: "We feel no hesitancy in holding that the property in question in this case cannot be made subject to a mechanics' lien, in view of the statute which exempts it from execution." Our statute enumerates bridges in the class of property which is subject to mechanics' liens (Hill's Code, § 3669); but, since a bridge may be constructed by a private person for his own use, the mere adoption of the word in the statutory classification does not necessarily mean a public bridge, and public policy demanding that a bridge built by a county on a public highway should be open to the public, which might be denied the use thereof if it could be sold under execution, compels us to hold that without the use of the qualifying word "public," no lien can attach to or be enforced against a bridge of that character.

2. The bridge not having been accepted by the county at the time the lien claims were filed, the question is presented whether the defendant had such an interest in the property sought to be charged therewith as would preclude the claimants from obtaining the benefits to be derived from the mechanics' lien law. The lien provided by the statute attaches to the building or other improvement in consequence of the labor bestowed upon it or the material that has entered into and become a part of the

structure, which, being permanently attached to and becoming a part of the soil upon which it rests, the lien, by relation, attaches to the land also, and if the person who caused the erection of the structure does not own the land, the lien binds whatever interest he has therein: Hill's Code, §§ 3669 and 3670. The County Court of Malheur County had authority to provide for the erection of a public bridge upon any highway established by public authority (Code, § 896, subd. 4), and could apply any money in the county treasury, not otherwise appropriated, toward defraying the expense of building a bridge on any county road within its borders: Code, § 4140. These sections of the statute impliedly prohibit a county from constructing a bridge not on a county road, or expending public money in payment thereof, and, as the law presumes that official duty has been regularly performed (Code, § 776, subd. 15), it must be presumed from the provisions the County Court made for the erection of the bridge, and the payment of \$2,000 on account thereof, that it was built on a county road. This being so, if the liens attached to the bridge, they bound the defendant's interest in the county road, which could be sold on the foreclosure of the liens; but, as the county road is exempt from execution, it follows that the liens never attached to the bridge, and hence the defendant acquired no interest in the claims therefor by their assignment to it, and the court erred in admitting them in evidence.

3. It is contended that the County Court had no authority to settle with the lien claimants, nor could it offset any part of the amount so paid against the plaintiff's demand, and that the court erred in its instruction to the jury to the effect that, if the bridge company permitted liens to be perfected against the bridge before it was accepted, the County Court could discharge the same and charge the amount so paid to the plaintiff, as the assignee

of the Bullen Bridge Company. The County Courts of the several counties of this State, in the transaction of county business, are courts of special and limited jurisdiction, and derive their authority from the statute conferring it. In *Wren v. Fargo*, 2 Or. 19, PRIM. J., in referring to the authority of a board of county commissioners, says: "Their powers and jurisdiction are limited by statute; and any official act of theirs, not authorized, is void." The right of a County Court, therefore, to enter into any contract or incur any obligation on behalf of the county, must be found in the statute, either expressly or by necessary implication: *Modoc County v. Spencer*, 37 Pac. 483; *Kelly v. Multnomah County*, 18 Or. 356 (22 Pac. 1110). Turning to the statute, we are unable to discover any provision that authorizes a County Court to pay off or take an assignment of claims against its creditor, or offset them against his demand. Hill's Code, § 896, subd. 10, provides that the County Court has authority to compound for or release in whole or in part any debt or damages arising out of contract due the county, and for the sole use thereof, upon such terms as may be just and equitable. Black, in his Law Dictionary, defines the word "compound" as follows: "To compromise; to effect a composition with a creditor; to obtain discharge from a debt by the payment of a smaller sum." The lien claimants were not creditors of nor were their claims enforceable against the county, and, no authority being found in the statute therefor, it could not legally discharge the same, or take an assignment thereof; but, having done so, these claims could not be offset against the plaintiff's demand. The county, upon principle, must necessarily have acquired a vested right in all the material used in the construction of the bridge when such material was placed in position, and thus became permanently attached to the soil, and from that moment the property, being exempt from ex-

cution, could not become subject to mechanics' liens. If this were not so, the public road upon which the structure rested might be sold upon the foreclosure of any lien upon the bridge prior to its acceptance, thereby depriving the public of its use of the highway. If the bridge was never accepted by the county, the structure would doubtless be removed, but, until the material of which it was constructed had been severed from the land, it could not become subject to mechanics' liens. The evidence conclusively shows that the bridge was nearly if not quite completed before the lien claims were filed, and this being so the court erred in giving the instruction of which the plaintiff complains.

The plaintiff, prior to the filing of said lien claims, sent to the county clerk of said county the following telegram:

"Boise City, Idaho, 1/24, '95.

To C. W. Platt, Vale, Oregon (mail, Ontario, Oregon):

Hold sufficient to pay labor until Bullen settles same.
Send us balance

(Signed) FIRST NATIONAL BANK OF IDAHO."

It is contended that this message authorized the County Court to pay said claims, and constitutes an estoppel against the maintenance of this action. The request to hold a sufficient amount of the \$2,000 due under the contract cannot be construed as a direction to pay the laborers. The telegram, in our judgment, contains no elements, either of contract or misrepresentation, that would constitute an equitable estoppel against the plaintiff or prevent it from maintaining this action. It follows that the judgment is reversed, and the cause remanded for a new trial.

REVERSED.

Argued November 18, 1896; decided January 18, 1897; rehearing denied.

HOLMAN v. DELIN.

(47 Pac. 708.)

WAIVER OF MOTION BY DEMURRING.—A motion to strike out parts of an answer is waived by the subsequent filing and hearing of a demurrer thereto.

QUESTION RAISED BY APPEAL.—Where a demurrer to a part of an answer has been overruled, and the parties have gone to trial, an appeal by defendant from a judgment against him does not bring to the appellate court the question of the sufficiency of the answer.

LANDLORD AND TENANT.—An action for the use and occupation of real property must be supported by a contract of leasing, either express or implied.

LANDLORD AND TENANT—CODE, §§ 2984, 2985.*—The provisions of sections 2984 and 2985, Hill's Code, do not create a right which gives rents, but prescribe a remedy, and relate to the recovery of rents when due, and must be based upon subsisting conventional relations: *Stewart v. Perkins*, 3 Or. 508, cited and approved.

LANDLORD AND TENANT—ASSIGNMENT OF LEASE—CANCELLATION.—A lessee who has assigned his interest in the lease to his co-tenant cannot, by afterwards paying the rent to the end of the term, and taking an assignment to himself of the interest of the lessor, recover on the lease from his co-tenant, or a tenant of his co-tenant, the amount of rent so paid by him, as by such payment all obligations under the lease are discharged.

PRESUMPTION CONCERNING TENANT.—The occupant of premises for which there is an outstanding lease, if not the lessee himself or his assignee, is presumed to be a sub-tenant in some degree of the original lessee.

LIABILITY OF SUB-TENANT FOR RENT.—A sub-tenant is not answerable to the original lessor for the rental, as there is neither privity of estate or contract between them.

FORFEITURE OF LEASE BY BREACH OF CONDITION.—Breach of a condition in a lease against assigning or sub-leasing without permis-

*NOTE.—These sections read as follows: "2984. Every person in possession of land out of which any rent is due, whether it was originally demised in fee, or for any other estate of freehold, or for any term of years, shall be liable for the amount or proportion of rent due from the land in his possession, although it be only a part of what was originally demised." "2985. Such rent may be recovered in an action at law, and the deed of demise, or other instrument in writing, if there be any, showing the provisions of the lease, may be used in evidence by either party, to prove the amount due from the defendant." —REPORTER.

sion of the lessor does not avoid the lease, except at the option of the lessor, shown by re-entry.

From Multnomah: E. D. SHATTUCK, Judge.

Action by Edward Holman against the DeLin-River-Finley Co., a corporation, John P. Finley, and C. R. Rieger to recover under a certain lease assigned to him by T. L. Ray and others. The facts are fully stated in the opinion. There was a judgment against the corporation and J. P. Finley, from which they have prosecuted this appeal.

REVERSED.

For appellants there was a brief over the names of *Bronaugh, McArthur, Fenton & Bronaugh*, and *Deady & Metcalf*, with oral arguments by *Messrs. Earl C. Bronaugh and Wm. D. Fenton*.

For respondents there was a brief over the names of *Glen O. Holman*, and *Dolph, Mallory & Simon*, with oral arguments by *Messrs. Holman and Rufus Mallory*.

Opinion by MR. JUSTICE WOLVERTON.

The basis of plaintiff's action is a claim or demand for rent for use and occupation of certain premises, situate in the City of Portland, from October 1, 1893, to January 4, 1895, at a monthly rental of \$200, payable in advance, alleged to have been assigned to him by T. L. Ray, R. L. Ray, H. Ray, Sarah Ray, J. D. W. Ray, and Mary Arbuckle, who were and are the owners of said premises as joint tenants. To defeat the action, defendants answer that on September 25, 1889, the owners executed a lease of said premises to the plaintiff and the defendant DeLin, who were then partners as DeLin & Holman, for the term of five years, beginning with March 1, 1890, at a monthly rental of \$200, which the said DeLin & Holman undertook

to pay on the first day of each and every month during the term; that about December 2, 1892, DeLin & Holman dissolved their co-partnership, and Holman assigned to DeLin his one-half interest in the business theretofore carried on by them as such partners, and the aforesaid lease, and that thereafter DeLin remained in the possession and occupancy of the premises under the lease, but did not undertake or assume by the assignment to pay the rent, nor did the lessors undertake to accept or receive DeLin as and for DeLin & Holman, but thereafter continued to collect from and enforce the conditions of the lease against both DeLin and Holman as their tenants; that thereafter, about September 25, 1893, the DeLin-River-Finley Company, a corporation, succeeded to the business of DeLin, and thenceforth occupied the premises under DeLin, and as his tenant, and not otherwise; that about December 27, 1894, the lessors instituted an action in the Circuit Court of the State of Oregon for Multnomah County against the plaintiff and DeLin upon the lease, to recover for rent then in default, aggregating \$2,000, and that plaintiff thereupon paid and discharged his liability upon said lease, and by so doing relieved DeLin and every person whomsoever of liability for any rent due or to become due under the lease; but notwithstanding, plaintiff undertook to obtain from the lessors a transfer of the lease, and the right to recover for rent reserved, but that the said lease and liability thereunder has been wholly surrendered, satisfied, and discharged. The lease referred to in the answer was in fact executed by T. L. Ray alone. This the reply shows, and it is further alleged therein that defendants went into possession of the premises, and continued to occupy the same for the time set forth in the complaint, and to pay the owners thereof the rent for their use, and that such owners recognized and treated the defendants as their tenants during such time, and not the

plaintiff. A motion was interposed by plaintiff to strike out all the further and separate answer as sham and irrelevant, which was sustained, but it seems that a demurrer was subsequently filed in the same matter, heard and considered by the court, and overruled. At the trial, and after plaintiff had concluded the introduction of his evidence, the defendants moved for a non-suit, and after verdict moved for judgment non obstante, both which motions were overruled. The action of the court below in sustaining plaintiff's and overruling the defendants' said motions and in giving certain instructions duly excepted to, is assigned as error on the appeal.

The following facts may be regarded as having been proven at the time plaintiff rested his case in chief: That one B. B. Arbuckle was the agent for the owners of the building or premises, with authority to lease the same and collect the rents; that on the 25th day of September, 1889, Arbuckle, in the name of T. L. Ray, one of the joint owners, executed a lease, not under seal, to plaintiff, and the defendant DeLin, partners in business as undertakers as DeLin & Holman, purporting to let to them the entire interest in said building or premises for a term of five years, beginning March 1, 1890, at a monthly rental of \$200, payable in advance, which they undertook and agreed to pay. DeLin and Holman occupied the premises to November 28, 1892, when Holman went out. Thereafter DeLin, River, and Finley occupied them as co-partners until September, 1893, when they incorporated as the DeLin-River-Finley Company, which corporation continued in possession until January, 1895, when it ceased to do business, and vacated the premises. In the meantime—about July, 1894—DeLin sold and transferred his stock or interest in the concern to the defendant Rieger. DeLin paid the rent for December, 1892, being the first coming due after Holman's retirement, which Arbuckle

says was paid to him before he knew that Finley had become a member of the company. Thereafter all payments of rent for the company or corporation were made by Finley, except \$100 by DeLin. The rent was paid promptly to and inclusive of the month of August, 1893, but thenceforth the company dropped behind, paying the last item in October, 1894, which paid the rent in full to April 1, 1894. On December 15, 1894, Arbuckle called upon Holman for payment of back rent, then amounting to \$1,800—which Holman says was the first time he had been called upon since he left the place—upon failing to pay which he was sued by T. L. Ray on the 26th, and in January, 1895, he paid the rent in full to the expiration of the term of the lease, amounting to \$2,200, in consideration of which he took an assignment or release from all the joint owners of the premises, purporting to assign, set over, release, and quitclaim to him any claim that they, or either of them, jointly, or severally, had against DeLin, River, Finley, or Rieger, or either of them, either in their individual, co-partnership, or corporate capacity, for rent of said building, and also any claim for rent due or to become due under the DeLin & Holman lease, which is attached to and made part of the assignment.

Arbuckle testified, in effect, that Finley always claimed to be trying to pay the rent, saying at one time that if he could sell some property in California he would straighten it up, and in May or June, 1894, he said that when Rieger got an interest in the company he expected to be able to pay in full, as he would bring money into the business. River and Finley objected to the receipts for rent being made to Holman & DeLin, and at their suggestion Arbuckle made them to "DeLin & Co.," after March 3, 1893, but continued to demand the rent of DeLin & Co. under the lease. The lessors, at the time they assigned to Holman, had not cancelled the lease, nor released DeLin and

Holman, or either of them. It was a question with them who was to pay the rent. Finley requested Arbuckle not to say anything about it to Holman, that he would pay it, and asked for a reduction, which was refused for fear it might invalidate the lease. The purpose of the assignment was to transfer whatever claim the assignors had to Holman, whether under the lease or otherwise. They claimed that DeLin & Holman were held under the lease, and it was a question whether Finley and Rieger were or not, and if they had any such claim against Finley & Co. they assigned it to Holman. W. C. Kolb testified that he heard a conversation between Finley and River, who claimed there was a clause in the lease prohibiting its assignment or transfer without the consent of the lessees. Finley said they were not responsible, but that they would go along and do the best they could; that he thought they would be able to pay the rent, and expected business to pick up, and that he did not want to move, as it would cost him a thousand dollars. The witness corroborates Arbuckle touching what Finley said to him about the payment of rent, and the reasons why he was unable to pay. On cross examination, he testified that they, Finley and River, said the rent was too much, and that they had gone to see Arbuckle to get him to reduce it, and that if they could not, and they could get a cheaper place, they would move out; that they were not responsible, and the lease would not hold them. They tried to get a place from the A. O. U. W. people, and failed. This is, in effect and substance, all the testimony offered by the plaintiff when he rested.

The motion to strike out was undoubtedly waived by the subsequent filing, hearing, and determination of the demurrer, and thereby treating it as not in the record; and, the demurrer having been overruled, the defendants' appeal does not bring here the question of the sufficiency of the answer, tested by either of these papers or documents.

Notwithstanding this, since it was so urgently insisted at the argument that the facts stated do not constitute a defense, and as preliminary to the cardinal question in the case—that of non-suit—we are constrained to make the inquiry whether the position is tenable.

We think the separate answer states a good defense. It shows that the right of action depends upon a written lease, wherein plaintiff is one of the lessees, while he sues in the right of the lessors, which he claims by assignment from them after having himself paid all rent due or reserved under it to the end of the term. The action is for use and occupation, and it must be supported by a contract of leasing, express or implied: *Jennings v. Alexander*, 1 Hilt. 154; *Hurley v. Lamoreaux*, 29 Minn. 138 (12 N. W. 447). Sections 2984 and 2985, Hill's Code, do not, as supposed, create a right which gives rents, but prescribe a remedy. They relate to the recovery of rents when due, and must be based upon subsisting conventional relations: *Stewart v. Perkins*, 3 Or. 508; *Campbell v. Stetson*, 2 Met. (Mass.) 504. By accepting the assignment of plaintiff's interest in the lease DeLin did not assume any additional or new liability to the lessors for the payment of rent, nor did they accept or receive him as their lessee in the place and stead of DeLin & Holman, but continued to treat both as their tenants. Thus far, there could be no release of the liability of either DeLin or the plaintiff under the lease. DeLin continued to occupy the premises until the corporation was formed, which took possession under DeLin as his tenant, and not as the tenant of the owners, nor as assignee of the term; but this did not change the rights and liabilities of the parties to and under the lease. Now, while the conditions were as delineated, the plaintiff, one of the lessees, prior to the expiration of the term, paid all rent reserved, whether due or to become due, took an assignment of the lease, and now sues by virtue of alleged

rights acquired from the lessors by the assignment. It is perfectly apparent that plaintiff has not acquired any such rights as will support the action. His payment of the rent reserved to the lessors discharged the obligation under the lease to pay rent as fully and completely as though DeLin or they together had paid it. The lessors thenceforth had no right of recovery in any form upon the lease by virtue of the particular obligation to pay rent; and the plaintiff, by the assignment, could acquire no higher right than they. The answer is a sort of *reductio ad absurdum* of plaintiff's position. He is placed in the light of acquiring the interest of the lessors for the purpose of suing himself, or, what is equivalent, his co-obligor upon the instrument, after he had discharged the obligation; the other defendants being the tenants of his co-obligor, and not of his assignors. It was also suggested that the answer is sham, in that the copy of the lease attached and made part of it shows that the leasing was between T. L. Ray, one of the joint tenants only, and DeLin & Holman, whereas it is alleged that it was executed by all the joint owners; but if the lease purporting to be of the whole interest is the source of plaintiff's title or right of action, he standing in the shoes of the lessors by virtue of the assignment, and the rent reserved having been paid and discharged by the plaintiff himself, the defense is complete. It shows such an outstanding lease so treated and considered as will preclude a recovery by the lessors against sub-tenants.

We come now to the question of non-suit. Ordinarily a *prima facie* case would be made in an action for use and occupation when occupancy has been shown, and an attornment with the rental value, or an agreement to pay a definite sum, and the proof herein offered is undoubtedly sufficient for that purpose. The reply, however, admits an outstanding lease—the same as set up by the answer—

but seeks to avoid its effect by alleging an occupancy by defendants under plaintiff's assignors, and an attornment to them for the use of the premises, and a recognition of the defendants by such assignors as their tenants. This presupposes a surrender or nullification of the outstanding lease, although it is not in terms so alleged, as while such lease subsisted the plaintiff's assignors could not let to other parties. They could not have two tenants at one and the same time: *Logan v. Anderson*, 2 Doug. (Mich.) 103. It also appears from plaintiff's proof that such a lease was executed, and that plaintiff treated it as outstanding and subsisting by occupying the premises under it jointly with DeLin up to about November 28, 1892. The evidence does not disclose what functions the lease performed after that date, or what was done with it, or how it was treated by the parties concerned, except that plaintiff paid the rent under it, and took and accepted an assignment of it to himself; but it must be taken to have continued as subsisting and outstanding until the expiration of the term thereby created, unless it was shown to have been cancelled or surrendered by the act of the parties to it. In this connection we may indulge a corollary presumption, and that is, when once it appears that there is an outstanding lease of premises, the occupant thereof, if not the lessee himself or his assignee, is the tenant of the rightful owner of the term, or, rather, that he is a subtenant in some degree of the original lessor. Such a tenant is not answerable to the owner of the premises for the rental, because there is neither privity of estate nor of contract between them: *Jennings v. Alexander*, 1 Hilt. 154; *Simmons v. Fielder*, 46 Ala. 304; *McFarlan v. Watson*, 3 N. Y. 286; 1 Taylor's Landlord and Tenant, § 109; 2 Id. § 448. It was, therefore, incumbent upon the plaintiff to overcome in some manner these attendant presumptive conditions touching the incongruous lease (*Rehm v. Weiss*,

28 N. Y. Sup. 772; *Doty v. Gillett*, 43 Mich, 206); and the granting of the non-suit must depend upon whether the plaintiff has produced evidence from which a surrender of the same may be inferred. If he has, there was enough to go to the jury; otherwise not. A surrender may be effected by express agreement, or by operation of law. It takes place by operation of law when the parties, without express surrender, do some act which implies that they have mutually agreed to consider the surrender as made: 2 Taylor's Landlord and Tenant, § 512; *Beall v. White*, 94 U. S. 389; *Wheeler v. Walden*, 17 Neb. 122 (22 N. W. 346). There is no testimony here tending to establish an express surrender. Is there any from which one by operation of law may be inferred? To establish a letting by plaintiff's assignors to the defendants, it is shown that they, through their agent Arbuckle, collected the rents directly from the defendants, and that the later receipts were issued in the name of DeLin & Co., instead of DeLin & Holman, the original lessees. All this is competent as evidence tending to show a leasing, but it is not of itself sufficient from which to infer the surrender of the subsisting repugnant lease theretofore executed by the plaintiff's assignors to himself and partner. The agent of the assignors positively refused to do anything which would have a tendency to release plaintiff from his liability, so there is here no intention on the part of the assignors to assent to a surrender. DeLin, the partner of plaintiff, surely did nothing from which the remotest inference could be drawn that he had agreed to such an act or transaction. Holman says he was not called upon for the rent for twenty-five months after he went out, which is very true, no doubt; but he recognized the subsistence of the lease at that time by paying the rent due, not only for the time which defendants had occupied the premises, but to the end of the term fixed thereby, which had not yet expired.

And, further than this, he treated the lease as a subsisting document by taking an assignment of it to himself. Instead of this testimony justifying an inference that the assignors of plaintiff and he had agreed to a surrender, it proves the very opposite—that there was absolutely no intention by either party to the lease, much less that there was a mutual understanding, that a surrender should take place. So we think the testimony offered failed to show a case sufficient to go to the jury, and the testimony for defendant was not more favorable to plaintiff.

It was argued that, as the lease contains covenants against an assignment or a sub-leasing by the lessees without the consent of the lessors, it was rendered void by reason of the assignment and the occupancy by the defendant company under DeLin, but these covenants were made for the benefit of the lessors, and it was incumbent upon them to re-enter in order to terminate the lease or re-vest the estate in them: *Shattuck v. Lovejoy*, 8 Gray, 204. It was not shown that they did this, and hence were not reinvested of their old estate. These conclusions render it unnecessary to examine the other questions made in the briefs and at the argument. The judgment of the court below will be reversed, and the cause remanded with directions to allow the non-suit.

REVERSED.

Decided November 9, 1896; rehearing denied.

COX v. ALEXANDER.

(46 Pac. 794.)

1. APPEAL FROM JOINT AND SEVERAL JUDGMENT.—Any one of several defendants against whom a joint and several judgment has been rendered may appeal therefrom, even though he be one of a co-partnership, and the firm does not appeal. The rule laid down in *Simpson v. Prather*, 5 Or. 86; and *Hamm v. Basche*, 22 Or. 513, followed.
2. ATTORNEY'S FEES IN NOTE—PROVINCE OF JURY.—In an action on a note providing for reasonable attorney's fees, in which defendant

30	488
136	181
30	488
36	427
30	438
147	485

raises an issue as to the reasonableness of the amount claimed, not only must there be testimony to determine the question (*Bradt-feldt v. Cooke*, 27 Or. 194, cited), but such testimony must be presented to the jury, and it is their right to determine that as they do other disputed questions of fact, so that the court cannot include in a judgment an allowance for attorney's fees, where the jury did not fix the amount by their verdict. A court cannot thus render a special verdict on one of the disputed issues, while the jury determines the other issues: *Fiore v. Ladd*, 29 Or. 528, approved and followed.

3. FILLING BLANKS IN PROMISSORY NOTE—ALTERATION OF INSTRUMENT.*—The delivery of a negotiable promissory note with a blank left for the name of the payee or the place of payment confers implied authority upon a bona fide holder thereof to fill in the blanks, without the special consent of the maker; and such additions to a note are not a material alteration of the instrument: *Thompson v. Rathbun*, 18 Or. 202, cited and applied.

From Multnomah: E. D. SHATTUCK, Judge.

Action on a promissory note, and from a judgment for plaintiff one defendant appeals. The facts are fully stated in the opinion.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. John M. Bower*.

For respondent there was a brief and an oral argument by *Messrs. Thos. O'Day* and *Louis H. Tarpley*.

Opinion by MR. CHIEF JUSTICE MOORE.

This is an action by Norris R. Cox against Robert Alexander, John Robertson, and G. W. Wallace, to recover

*NOTE.—The following annotated cases contain a large amount of interesting reading on the subject of filling blanks and altering instruments: *Ruby v. Talbot*, 3 L. R. A. 724, with note concerning The Effect on Previous Parties of a Material Alteration of a Note; *Wilson v. Hayes*, 4 L. R. A. 196, with note on Alteration as a Fraud in Law, the effect of which will be to release the party affected; *Palmer v. Poor*, 6 L. R. A. 469, and *Citizens' Nat. Bank v. Williams*, 35 L. R. A. 464, having appended a collection of authorities on Altering Promissory Notes by Filling in Blanks; *Spanders v. Bagwell*, 7 L. R. A. 743, with note discussing the Effect of Material and Immaterial Alterations in Written Instruments on Both Principals and Sureties;

on a promissory note alleged to have been executed by the defendants to one Thomas O'Day, and by the latter assigned to plaintiff. The answer, after denying the material allegations of the complaint, which is in the usual form, alleges that Robertson and Wallace entered into negotiations with G. Kutschan, S. Walker, and Dave Ogilvie for the purchase of 10,500 shares of mining stock, agreeing to pay therefor \$3,150, to be evidenced by the defendants' promissory note, provided Alexander would ratify and confirm such purchase, and also agreed to give a writing in the form of a promissory note, with the understanding that it should not be considered as the note of the defendants until it was ratified, confirmed, and executed by Alexander; that in pursuance of such agreement, Robertson and Wallace delivered to the persons with whom such agreement was made the following written instrument:

"\$3,150.

Portland, Or., April 18, 1893.

Ninety days after date, without grace, we, or either of us, jointly and severally promise to pay to the order of
..... three thousand one hundred and fifty dollars, for

Burrows v. Klunk, 14 Am. St. Rep. 376, with note on the General Rules of Law Applicable to Alterations of Written Instruments; *Fordyce v. Kosminski*, 4 Am. St. Rep. 25, with an extensive collection on What Constitutes a Material Alteration in a Written Instrument and the Effect Thereof.

The burden of proof is upon a party producing an altered note to show the legality of the instrument: *Croswell v. Labree*, 10 Am. St. Rep. 238; *Harris v. Bank of Jacksonville*, 1 Am. St. Rep. 202; *National Ulster County Bank v. Madden*, 11 Am. St. Rep. 633, with note; *Warder v. Willyard*, 24 Am. St. Rep. 253, and note. The burden of proving that a note was altered after indorsement is upon the indorser, where he relies on that fact as a defense: *Montgomery v. Crosthwait*, 12 L. R. A. 140. In *Wolferman v. Bell*, 36 Am. St. Rep. 126, the court held that an altered note is presumptively in the same condition when offered in evidence as when made: *Walton Plow Co. v. Campbell*, 16 L. R. A. 468, decides that a fraudulent alteration of a note secured by a chattel mortgage cancels the debt and discharges the mortgage, and carries a note collecting the opposing authorities on this question. See also *Hollingsworth v. Holbrook*, 20 Am. St. Rep. 411, and *Wardner & Glessner Co. v. Willyard*, 24 Am. St. Rep. 250.—REPORTER.

value received, with interest after date at the rate of eight per cent. per annum until paid, principal and interest payable in U. S. gold coin at, and in case suit or action is instituted to collect this note or any portion thereof, we or I promise to pay such additional sum as the court may adjudge reasonable as attorneys' fees in said suit or action.

(Signed)

ROBERTSON & ALEXANDER,
JOHN ROBERTSON.
G. W. WALLACE."

It is then added that Alexander refused to ratify or confirm the purchase, or to execute or deliver said note, and the persons with whom said contract was made failed to deliver the stock, and the said negotiations were terminated; that subsequently, without authority or consideration therefor, the persons to whom said writing had been delivered caused it to be perfected in the form of a promissory note, and indorsed to plaintiff for collection, who brought this action thereon. "And for a further and separate defense to plaintiff's complaint, defendants allege: That there never was any value or consideration passed from Thomas O'Day or any one to these defendants for said note, and the same came into the hands of said O'Day wholly without consideration, and the plaintiff, at the time the same was indorsed and transferred to him, had notice and knowledge that the same was wholly without consideration." The reply having put in issue the allegations of new matter contained in the answer, except the separate defense above quoted, a trial was had, resulting in a verdict for the amount due on the note only; and upon the issue of attorney's fee the court found that \$250 was a reasonable sum therefor, and gave judgment on the verdict, and also for such attorney's fee, from which the defendant Alexander appeals.

I. The plaintiff's counsel moves to dismiss the appeal, contending that the note upon which the action is founded having been signed by the firm of Robertson & Alexander was a joint obligation upon which the court rendered a joint judgment, and, this being so, there is such a unity of interest between the members of said firm as to bar an appeal by Alexander alone. It appears from the complaint that the defendants John Robertson and Robert Alexander are co-partners, doing business under the firm name of Robertson & Alexander, and that the note in question is a joint and several obligation, and all the defendants having appeared in the action, the court, observing the provisions of the statute, very properly rendered judgment against each and all of them: Hill's Code, §§ 60 and 245.* Section 536 of the Code provides that any party to an action or suit against whom a final judgment or decree has been rendered, other than a judgment or decree given by confession or for want of an answer, may appeal therefrom; and Mr. Black, in his work on Judgments (Vol. 1, § 237), in speaking of the validity of the judgments rendered against partners, some of whom had not been served with process, says: "In those states, however, where the 'joint debtors acts' are in force, if not all the partners are served with process, still a judgment may be rendered against the firm, to be enforced against the partnership property and the individual property of the partners served." In *Simpson v. Prather*, 5 Or. 86, it is

*Section 60 of Hill's Code, so far as here applicable, reads as follows: "When the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows: * * * (3) If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants if the action had been against them, or any of them alone."

Section 245 reads: "In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, whenever a several judgment is proper, leaving the action to proceed against the others."—REPORTER.

held that a judgment against one party only, jointly and severally bound with others, was strictly in accordance with the terms fixed by such party in the written instrument which was the foundation of the action. To the same effect, see also *Sears v. McGrew*, 10 Or. 48; *Hamm v. Basche*, 22 Or. 513 (30 Pac. 501). In *Estis v. Trabue*, 128 U. S. 225 (9 Sup. Ct. 59), Mr. Justice BLATCHFORD, in commenting upon a writ of error taken out in the name of a firm as plaintiffs in error, without indicating in such writ the individuals composing the firm, says: "It is well settled that this court cannot take jurisdiction of a writ of error which describes the parties by the name of a firm, or which designates some of the parties by the expression of '& Co.,' or the expression 'and others,' or any other way than by their individual names." The individual name of the appellant having been stated in the pleadings, and the judgment being several, the record discloses that the appeal was perfected by one having a substantial interest in the controversy, which will be affected by the judgment on appeal, and, having filed a transcript of the cause, this court has jurisdiction thereof.

As another ground for the dismissal of the appeal, plaintiff's counsel maintains that the printed abstract does not comply with the rules of this court, in that it does not affirmatively show on its face that the trial court committed any error. Rule 4 (24 Or. 595, 37 Pac. 6) makes it incumbent upon the appellant to serve upon the attorney for each respondent a printed copy of so much of the transcript as may be necessary to a full understanding of the question presented for decision. The abstract so served in this case states the general nature and substance of the pleadings, and contains a copy of the further and separate defense to the complaint; but, because copies of the entire pleadings are not embraced therein, it is insisted that the appellant has not complied with said rule. The

plaintiff having failed to reply to the further and separate defense, the defendants moved for a judgment on the pleadings, which, being denied, the action of the court in such ruling is sought to be reviewed. The only question involving the pleadings is as to that part of the answer to which there was no reply, a copy of which is set out in the abstract, and from this it is apparent that the appellant has furnished so much of the record in that respect as is necessary to a full understanding of the pleadings. The motion to dismiss the appeal must therefore be overruled.

2. The jury having failed to include in their verdict any allowance for the attorneys' fees provided for by the terms of the note, counsel for the appellant contends that the court had no authority to make a finding upon the issue thereon, and erred in rendering a judgment for such fees. It is settled in this State that where the parties have provided in a promissory note for the payment of a reasonable amount of attorneys' fees, such promise may be enforced in an action on the obligation: *Kimball v. Moir*, 15 Or. 427 (15 Pac. 669); *Bradtfeldt v. Cooke*, 27 Or. 194 (50 Am. St. Rep. 701, 40 Pac. 1). An issue having been joined upon the question of the reasonableness of the attorney fee demanded, the parties were entitled to a trial of that issue; but, the jury having returned a verdict for the amount due on the note only, it must be presumed that they refused to allow any sum as attorneys' fees: Hill's Code, § 776, subd. 18, providing that all matters within an issue are presumed to have been submitted to the jury, and passed upon by them. It may be conceded that the judge was better qualified than the jury to pass upon this particular issue, and this might be said, with a good deal of truth, in other cases. But it must be remembered that the right of trial by jury is dear to the American people, and, having been guaranteed by the organic law of the state (Const. Or., Art. I, § 17), the court was without

power to render a special verdict on any of the issues submitted to the jury: *Fiore v. Ladd*, 29 Or. 528 (46 Pac. 144). In consequence of the error of the court in this respect, the judgment must be reversed.

3. There is, however, another question going to the cause of action, a consideration of which is deemed important. The promissory note in question, having been offered in evidence, revealed the fact that the blanks, alleged to have been left therein at the time it was signed were filled by inserting the name of "Thomas O'Day" in the first, and "office of Thomas O'Day" in the second. The court, instructing the jury upon the right of the holder of a promissory note to fill such blanks, said: "In this case the promissory note sued upon, on its face, appears to be a binding instrument. Something has been said, however, about the instrument having been made with blanks in it. When it was signed the name 'O'Day' was blank, and the place of payment was blank. Such a transaction makes no difference in the validity of the instrument, if it is delivered for a consideration. The party receiving it may put his name into the blank; he may put the name of some person to whom he transfers it, and it is then a valid instrument, and may be enforced against the parties, if there is no objection. The same may be said in reference to the place of payment, providing the blanks are filled up by some person having an interest in the instrument." The defendants excepted to that portion of the instruction which relates to the right of the holder of a promissory note, after the delivery thereof, to insert in a blank reserved for that purpose a place of payment, and their counsel contends that the insertion of the words "the office of Thomas O'Day, Portland," was a material alteration of the instrument. It is a principle of universal application that any material alteration made in a promissory note after its execution or indorsement, by one

claiming under it, without the consent of the maker and indorser, discharges the previous parties to the instrument: *Woodworth v. Bank of America*, 19 Johns. 391 (10 Am. Dec. 239); *Nazro v. Fuller*, 24 Wend. 374; *Ruby v. Talbott* (N. M.), 3 L. R. A. 724 (21 Pac. 72). But where a promissory note is issued with a blank for the payee's name, a bona fide holder thereof may, within a reasonable time, fill the blank by inserting his name therein, and thus give certainty to one of the essential requisites of such instruments: *Thompson v. Rathbun*, 18 Or. 202 (22 Pac. 837). The authority of the holder of a promissory note to supply the omissions therein, and insert his name as payee thereof, rests upon the doctrine of agency. The maker of a note, by omitting to name the payee therein, impliedly invites a bona fide holder thereof to supply the omission and give certainty to the contract; and this implied power renders a bona fide holder the agent of the maker, and confers upon such agent authority to supply any omissions in the instrument that are not inconsistent with the terms of the contract.

In *Angle v. Northwest Mut. Ins. Co.*, 92 U. S. 330, Mr. Justice CLIFFORD, in commenting upon this subject, says: "Persons dealing with an agent are entitled to the same protection as if dealing with the principal, to the extent that the agent acts within the scope of his authority. Pursuant to that rule, it is settled law that where a party to a negotiable instrument intrusts it to another for use as such, with blanks not filled up, such instrument so delivered carries on its face an implied authority to complete the same by filling up the blanks; but the authority implied from the existence of the blanks would not authorize the person intrusted with the instrument to vary or alter the material terms of the instrument by erasing what is written or printed as a part of the same, nor to pervert the scope and meaning of the same by filling the blanks with

stipulations repugnant to what was plainly and clearly expressed in the instrument before it was so delivered." In *Kitchen v. Place*, 41 Barb. 465, it is held that the holder of a promissory note had implied authority to insert the words "Importers' and Traders' Bank" in a blank which was left in the note between the word "at" and the words "value received," all which were in the printed part of the note. LEONARD, J., in deciding the cause, says: "The word 'at' implied that the blank space which succeeded it might be filled before the note should be delivered, with a designated place of payment. Had that word been erased, the same would have been complete without filling the blank. With this isolated word, the note was imperfect in its purport, until the space was filled or the word erased." In *Redlich v. Doll*, 54 N. Y. 234 (13 Am. Rep. 573), the holder of a promissory note inserted between the words "at" and "value received" the words "The Bull's Head Bank of New York," and negotiated it. In an action brought by the endorsee against the maker, it was claimed that this was such a material and unauthorized alteration of the instrument as to defeat the right of recovery; but it was held that the word "at" preceding a blank in the note carried upon its face an implied authority for any bona fide holder thereof to insert a place of payment. To the same effect, see also *McGrath v. Clark*, 56 N. Y. 34 (15 Am. Rep. 372); *Fullerton v. Sturges*, 4 Ohio St. 529; *Emmons v. Meeker*, 55 Ind. 321. It will be observed from an examination of the note in question that the word "at" therein preceded a blank in the instrument, and, this being so, any bona fide holder thereof had implied authority to insert a place of payment, and hence there was no error in the instruction complained of. But, in consequence of the error hereinbefore referred to, the judgment is reversed, and a new trial ordered.

REVERSED.

Argued November 23, 1896; decided February 15, 1897.

ROYAL v. ROYAL.

(47 Pac. 828.)

EXPENDITURES BY TRUSTEE.—One holding the legal title to land, partly, however, in trust, cannot charge the cestui que trust with money expended without his consent or knowledge for subsidies to such enterprises as water works or street-car lines.

COMPENSATION OF TRUSTEE.—A trustee of lands who receives the income therefrom without rendering any account thereof, or being called upon for an account, is not entitled to any compensation for services as trustee.

COSTS—TRUSTEES.—Where litigation has been caused by the wrongful conduct of a trustee or of one of the parties to a contract, the costs and disbursements ought to be charged against the party at fault.

SUPPLEMENTAL PLEADINGS—CHANGE OF CONDITIONS.—Where, pending an appeal, the conditions and surroundings of one of the parties change so that a decree predicated on the facts existing at the time of trial will be inequitable, the cause should be remanded, to the end that supplemental pleadings may be filed and justice administered.

From Multnomah: LOYAL B. STEARNS, Judge.

Cross bill by Osmon Royal against Ladru Royal, to enjoin an action of ejectment, and to enforce a trust in the land. From a decree enforcing the trust, but charging plaintiff with certain sums, he appeals.

MODIFIED.

For appellant there was a brief over the signature of *Dell Stuart* and *Dolph, Mallory & Simon*, with an oral argument by *Messrs. Rufus Mallory* and *Dell Stuart*.

For respondent there was a brief over the signature of *Henry H. Northup* and *Paxton, Beach & Simon*, with an oral argument by *Mr. Northup*.

Opinion by MR. JUSTICE BEAN.

This is a proceeding by cross bill to enjoin an action at law, and for a decree that plaintiff is the owner of an undivided half interest in the real property which the defendant seeks to recover in the action. The facts are that on September 15, 1875, C. W. Royal, the father of the parties to this suit, conveyed the land in question to the defendant, Ladru Royal, in consideration of an agreement by him and his brother to pay and discharge his outstanding obligations, the undivided one-half thereof to be held in trust for plaintiff. To accomplish this purpose, the said parties put their earnings into a common fund, which was used in the support of themselves and parents, and in payment of such outstanding debts, until August, 1878, when the plaintiff, Osmon Royal, went east to attend school and complete his professional education, where he remained until some time in 1885, when he returned to Oregon, and soon thereafter erected a sanitarium upon the land in question, and occupied the same until about the 25th of October, 1892, at which time the defendant, denying his title or interest therein, brought an action to recover possession of the property, and in such action this cross bill was filed. The defendant answered the cross bill, denying the plaintiff's alleged interest in the property, and set up title in himself, and, in addition thereto, claimed and alleged that he had paid more than his proportion of the debts of his father outstanding at the time the deed was made in 1875; had loaned the plaintiff money to assist him in procuring an education; had put valuable and permanent improvements upon the property; and incurred divers and sundry other expenses in the management thereof, which he claimed should be charged against the plaintiff's interest therein, if it should be found that the allegations of his complaint in that regard are true. Upon a trial in open court of the issues joined, it was decreed that plaintiff is the owner of an undivided one-half of the real property

in controversy, and that defendant held the title thereof in trust for him. The cause was then sent to a referee with instructions to ascertain and report to the court, from the evidence already taken: first, the amount of the indebtedness of C. W. Royal at the time of the execution of the deed to Ladru Royal in 1875; second, how, when, and by whom these debts were paid, and from what source the money was derived; third, what expenditures have been made by either party on account of the land justly chargeable thereto, or for which the party making such expenditures is entitled to credit; fourth, whether the property has been encumbered, by mortgage or otherwise, prior to the commencement of this suit, and, if encumbered and money borrowed, when and by whom, in what amount or amounts, and to what use applied, and by whom; fifth, what sum or sums of money was or were advanced by either party to the other from the 8th day of August, 1878, the day when plaintiff left Oregon to attend school, until his return in 1885. After the case had been argued, and submitted to the referee, the court, on motion of defendant, directed him to include in his report an answer to the following additional questions: (1) What sum or sums of money were advanced to either by the other after plaintiff's return from school in 1885, up to the commencement of this suit; (2) what, if any, sums of money Ladru Royal paid out for the care and maintenance of his father and mother since the conveyance of the land to him; and (3) a general statement of all the accounts between the parties.

In due time the referee reported that the indebtedness of C. W. Royal at the time of the execution of the deed by him to the defendant amounted to \$1,682.99; second, that these debts had been paid, but it was impossible to determine from the evidence when they were settled, except that prior to August 8, 1878, there had been paid on

account thereof \$1,080.99, principal and interest, and on that date there remained unpaid \$838.75, making the total amount, paid and unpaid, \$1,917.74. The referee also finds that the business was generally done by the defendant, directly or through the agency of others, and that, to enable him to make payments on said indebtedness, the plaintiff, as well as Mr. and Mrs. C. W. Royal, turned into his possession and control their resources and earnings, and that these, together with his own earnings, constituted the source from which the debts were paid. He then undertakes to estimate the amount of money so received by the defendant from the plaintiff and Mr. and Mrs. C. W. Royal, and applied by him in payment and discharge of these debts, and arrives at the conclusion that on August 8, 1878, there was due from the plaintiff to the defendant, on account of advances by the latter in excess of his share, the sum of \$155.90. In answer to the third question, the referee finds that the cost of improvements, which were made by the defendant exclusively, less a small amount paid by Mrs. C. W. Royal, amounted in the aggregate to \$4,877, one-half of which should be charged to the plaintiff; and, in addition thereto, he finds the plaintiff should be charged with one-half of certain subscriptions in aid of street railway lines, and money invested in water works by the defendant, amounting, principal and interest, to \$1,567.19, and with one-half of \$1,100 taxes paid by defendant on the property, and with \$900 for defendant's services as trustee. He also finds that the defendant loaned to the plaintiff while he was east attending school the sum of \$790, and that, between the time of plaintiff's return to Oregon and the commencement of this suit, he became and is indebted to the defendant on general account in the sum of \$2,800.95. The referee then summarizes the account, and finds that the plaintiff is indebted to the defendant, including interest, in the sum of

is entitled to credit. In the matter of improvements on the property, the testimony shows them to consist of a house of the probable value of \$1,800, fencing \$200, well \$75, cistern \$25, clearing eighteen acres, at \$50 an acre, \$900, making a total of \$3,050. From this there should be deducted the sum of \$700 expended by plaintiff in building an addition to the dwelling house after his return from the east, leaving a balance of \$2,350 to defendant's credit on this account.

The matter of subsidies and subscriptions to street railways and water companies, for which the defendant was allowed credit by the referee and court below, must be entirely eliminated from his account, the evidence very clearly showing they were made on his own responsibility, for his own benefit, and as mere matter of speculation, and in no sense proper charges against plaintiff.

His claim of credit on account of taxes paid is based upon the fact that he paid taxes upon certain mortgages given by himself upon the property, and the evidence in relation to the amount thereof being indefinite and uncertain, in our opinion he should be allowed no more than \$241, the amount admitted by the reply; nor should he be allowed any compensation for his services as trustee. He, together with his father and mother, had possession and control of the property and of the incomes derived therefrom during the entire time, for which he has rendered no account, and is not charged in this proceeding with the use and occupation or rents and profits.

The evidence indicates, and it seems to be conceded by the plaintiff, that prior to his trip east to attend school it was agreed that all moneys loaned to him by defendant while thus engaged should be regarded as a charge or lien upon his interest in the land in question, and for this reason the defendant is entitled to a credit therefor. The amount of these advances was \$790. These, as we under-

stand the record, are all the items for which defendant is entitled to credit in this proceeding. But, as an offset thereto, he should be charged with a mortgage to secure the sum of \$2,200, put upon the property by himself during the absence of plaintiff in the east, and from the proceeds of which it is probable a portion if not all the outstanding debts of C. W. Royal were paid and discharged. So that, at the time of plaintiff's return, he should be charged with his proportion of the amount of C. W. Royal's debts paid by defendant, \$925; the cost of improvements, \$2,350; and taxes paid, \$241.50; and was entitled to a credit of \$2,200, the amount of the mortgage upon the land, leaving as a balance to the credit of defendant on the 1st day of January, 1886, the sum of \$1,316.50, one-half of which, together with the sum of \$790 loaned to the plaintiff while east, aggregating \$1,448.35, with legal interest from that date, is the amount due the defendant from the plaintiff on account of transactions arising out of the subject-matter of this suit. The decree of the court below is modified accordingly, and, inasmuch as the litigation was caused by defendant's wrongful denial of plaintiff's title, and the repudiation of his trust, the plaintiff should recover his costs and disbursements in this court, and the court below, and it is so ordered.

MODIFIED.

Decided May 1, 1897.

ON APPLICATION TO FILE SUPPLEMENTAL BILL.

Opinion by MR. JUSTICE BEAN.

This is a motion for an order remanding this cause, with permission to the plaintiff to apply to the court below for leave to file a supplemental bill, setting up the loss of the trust property by the defendant since the rendi-

tion of the decree from which this appeal was taken. From the showing made, it appears that during the pendency of this case in this court the property in controversy was sold on the foreclosure of a mortgage given by the defendant on February 2, 1892, to secure \$15,000, borrowed for his own benefit, and that the time for redemption has long since expired, so that he is now unable to comply with the decree. It is in view of these facts that the motion is made, and, as they are substantially admitted, we think it should be allowed. The decree heretofore ordered was predicated on the theory that the defendant held in trust for the plaintiff the title to certain property, upon which he had a lien for improvements made, money advanced, and taxes paid, and which he was able to convey to the plaintiff; but since he has in fact appropriated the trust property to his own use, or, at least, has suffered the title to pass from him, so that it is now impossible for him to comply with the decree on his part, it would certainly be rank injustice to permit him to enforce a decree against the plaintiff for a large sum of money arising out of transactions connected with the trusteeship, without being required to account for the damages sustained by the loss of the trust property, the value of which is variously estimated from \$8,000 to \$25,000. But, in view of this disposition of the case, it is proper that the petition of the defendant for a modification of the account between the parties, as stated in the former opinion, be allowed. In the statement of account as made, the defendant was charged with the proceeds of a mortgage to secure the sum of \$2,200 put upon the property by himself during the absence of the plaintiff in the east. This was done upon the theory that the trust property would be conveyed to the plaintiff charged with its proportionate share of the amount of this mortgage; but, inasmuch as it now appears that the defendant will be unable to comply with

the decree, and must account for the damages sustained by reason of the loss of the trust property, it will probably be more convenient to adjust the matter the same as if the defendant had obtained the money represented by the mortgage from some other source. The amount, therefore, with which the plaintiff should be charged in the accounting between himself and the defendant is \$2,548.25, and interest from January 1, 1886; and he is entitled to a credit for the entire loss of the trust property, to be hereafter ascertained. The cause will, therefore, be remanded to the court below, with permission to the plaintiff to apply to that court for leave to file a supplemental bill as suggested.

MOTION GRANTED.

Argued March 17; decided April 5, 1897.

STATE v. TICE.

(48 Pac. 367.)

30	457
33	181
32	209
30	457
38	288

1. EVIDENCE—STANDARD OF COMPARISON FOR HANDWRITING.—A writing not admitted or treated as genuine by the party against whom it is offered cannot, under the terms of section 765, Hill's Code, be received in evidence solely as a standard with which to compare a writing charged to be forged: *Munkers v. Farmers' Ins. Co.*, 30 Or. 211, approved and followed.
2. EVIDENCE OF HANDWRITING—SIGNATURE BY MARK.—The testimony as to the genuineness of handwriting contemplated by section 764, Hill's Code, extends to crosses or marks made as signatures, but the peculiarities of such marks, and the circumstances surrounding their execution, should be carefully considered in determining the value and weight to be given thereto.
3. DECLARATIONS OF CO-CONSPIRATOR.—Statements concerning a conspiracy made by one of the parties thereto after the common purpose has been effected are not competent evidence against other conspirators: *Osmun v. Winters*, 30 Or. 177, cited and applied.
4. EVIDENCE AGAINST CO-CONSPIRATOR.—On a charge of forging a will in pursuance of a conspiracy in which defendant participated, where the evidence tended to show that defendant forged the signature, testimony that an acknowledgment thereto was forged by others of the conspirators after the signature was written is admissible, since the question of whether the acknowledgment was part of the contemplated forgery is for the jury.

5. CORROBORATION OF ACCOMPLICE.—Testimony that a witness is acquainted with the handwriting of defendant charged with forgery, and recognizes the latter's signature, which appears attached to the forgery as that of a witness, to be in his handwriting, sufficiently corroborates an accomplice, and tends to connect the defendant with the commission of the crime charged.

From Multnomah: THOS. A. STEPHENS, Judge.

Jonathan Tice was convicted of forging the signature of Nancy M. Love to a will. Several others were charged with complicity in the affair, but they either pleaded guilty or were already in the service of the State for other incidents, so that Tice was the only one tried.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. John H. Woodward*.

For the State there was a brief over the names of *Cicero M. Idleman*, Attorney-General, and *Chas. F. Lord*, District Attorney, with an oral argument by *Mr. Idleman* and *Mr. Daniel J. Malarkey*.

Opinion by MR. JUSTICE WOLVERTON.

I. The defendant was indicted with others, and convicted of the crime of forgery. The subject of the forgery is an instrument purporting to be the last will and testament of one Nancy M. Love, and the crime consists, as the indictment charges, in falsely making and forging the name, "Nancy M. Love, her X mark," thereto. At the trial a genuine will of Nancy M. Love, which she had subscribed by her mark, was, after proving her death, offered and admitted in evidence, over the objection of the defendant, for the sole purpose of affording a comparison of the alleged forged mark with the signature mark subscribed thereto. Geo. G. Smith, a co-defendant who had pre-

viously pleaded guilty and received his sentence, testified, among other things, that Tice wrote Nancy M. Love's signature to the alleged will, and then his own. M. C. George, called as a witness for the State, testified that he knew Tice, and was familiar with his handwriting, and also with the mark of Nancy M. Love, and that the signature to the will and the name "Jonathan Tice" were in the handwriting of the defendant. The witness was, on re-direct examination, permitted, over the objections of defendant, to make a comparison in the presence of the jury of the mark to the alleged forged will with the one attached to the genuine will, and from such comparison he testified that in his opinion the mark subscribed to the pretended will was not the mark of Nancy M. Love. In this there was error. Under the English exposition of the common law rule the resort to a comparison of hands by placing them in juxtaposition for the purpose of determining the genuineness of a writing was not permitted, except in two instances; one was when a writing proved to be that of the party whose signature is in dispute is already in evidence, having been put in for other purposes, and the other pertained to ancient documents: Wharton's Criminal Evidence, §§ 555 and 556; Lawson's Expert Evidence, 327; *Mudd v. Suckermore*, Willm. W. & D. 405; S. C., 2 Nev. & P. 16 (1837); *Moore v. United States*, 91 U. S. 270. The rule has since been changed in that country by statutory enactment which permits comparison with "any writing proved to the satisfaction of the judge to be genuine." The rules upon the subject adopted in this country are not uniform. Some of the states adhere to the exposition of the common law doctrine as above stated; some, notably Massachusetts, hold, without statutory interposition, that a comparison may be made by the jury with other writings proved to be genuine, *Homer v. Wallis*, 6 Am. Dec. 169 (see also the

author's note at pages 171 and 172); *Commonwealth v. Coe*, 115 Mass. 481; and some of them have adopted statutes similar to the English enactment, but with different regulations touching the standard of comparison and the persons by whom it shall be made. According to the statutes of the latter states, the standard must be acknowledged or proved to the satisfaction of the court, and the comparison must be made by the jury alone, or by experts and the jury. These statutes relieve the question from the inextricable conflict which the courts have brought on by adverse holdings under the common law: *Baker v. Mygatt*, 14 Iowa, 131; *Peck v. Callaghan*, 95 N. Y. 73; *Georgia Masonic Co. v. Gibson*, 52 Ga. 640.

Our enactment touching the subject differs from any that we have been able to find. It is as follows: "Evidence respecting the handwriting may also be given by a comparison, made by a witness skilled in such matters, or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered": Hill's Code, § 765. This statute, it is held, has put the dispute elsewhere subsisting at rest, and a standard of comparison not admitted in evidence for another purpose, or otherwise relevant or competent, may, in this State, be submitted, by which to determine the genuineness of the writing in dispute: *Munkers v. Farmers' Insurance Co.*, 30 Or. — (46 Pac. 850). See also *Holmes v. Goldsmith*, 147 U. S. 150 (13 Sup. Ct. 288). The tests of the standard prescribed by the section quoted must be held to exclude any other test that might be permissible elsewhere. Applying these tests, it is clear that the genuine will of Nancy M. Love ought not to have been admitted for the sole purpose of instituting a comparison between the signature to the alleged forged will with her mark constituting her signature to the true one. It does not appear from the record that the defendant had admitted, nor is it

shown that he had treated, the true will as a genuine writing; so that it was not competent for the witness, admitting that he was a person skilled in such matters, to institute the comparison.

2. By section 764 of Hill's Code, it is provided that "the handwriting of a person may be shown by any one who believes it to be his and who has seen him write, or has seen writing purporting to have been his, upon which he has acted or been charged, and who has thus acquired a knowledge of his handwriting." It was, therefore, competent for the witness to testify from his own knowledge of the handwriting of the accused, when acquired in any of the modes pointed out, and, under the authorities, such testimony may extend to the mark of Nancy M. Love: *George v. Surrey*, M. & M. 516 (1830); *Sayer v. Glossop*, 12 Jur. 465; *Strong's Ex'rs. v. Brewer*, 17 Ala. 706; *Fogg v. Dennis*, 22 Tenn. 47; *Lansing v. Russell*, 3 Barb. Ch. 325; *Little v. Rogers* (Ga.), 24 S. E. 856; *Lawson's Expert Evidence*, 296. But they are not uniform, and some judges have strongly characterized such attempts to establish the identity of a mark as impossible and unsound. In *Engles v. Bruington*, 4 Yeates, 345 (2 Am. Dec. 411), it is said that "to attempt to prove a mark to a will would be idle and ludicrous." In a later case from the same state (*Shinkle v. Crock*, 17 Pa. St. 159), LEWIS, J., says: "Where a mark, on inspection, appears to have nothing in its construction to distinguish it from the ordinary marks used by illiterate persons to authenticate their contracts, it is not the subject of this description of evidence." VAN NESS, J., in *Jackson v. Van Dusen*, 5 Johns. 144 (4 Am. Dec. 330), says: "The testator having made his mark, no evidence, of course, could be given or expected, to prove his handwriting," and in *Carrier v. Hampton*, 11 Ired. 311, RUFFIN, C. J., says: "For, although in some very extraordinary instances, the mark

of an illiterate person may become so well known as to be susceptible of proof, like handwriting, yet, generally, a mark, a mere cross, cannot be identified." Considering the manner in which marks of persons incapable of writing their own signatures are usually made, by merely touching the pen while the scrivener forms the character, it is a matter of doubtful propriety whether any person ought to be allowed, as a matter of evidence, to identify such a mark as a handwriting; but the mark of some persons, by reason of methods of their own adoption in its formation, and its inherent peculiarities, might be capable of identification, and we are of the opinion that such evidence ought to be permitted to go to the jury, but the attending circumstances touching the habits of the person whose mark is in the balance, his accustomed manner of making the same, and the peculiarities attending it which render it capable of identification, should be carefully considered and scrutinized in determining the weight to be ascribed thereto.

3. Referring to another phase of the case, it appears that the witness R. I. Eaton was permitted, over the objections of the defendant, to recount before the jury what Geo. W. Edgar, one of the co-defendants, had narrated to him concerning what the witness says he "supposed was the history of this instrument." Admitting that Edgar was a co-conspirator with the defendant in the forging of this will, yet this testimony was clearly incompetent to show the participation of the defendant in the forgery. It was a subsequent narration of the transaction, and could not be considered as part of the *res gestae*, or as declarations concurrent in time with the commission of the unlawful act. The rule regarding what declarations of a party to a conspiracy may be used against his co-conspirators is well laid down in *Metcalfe v. Conner*, 12 Am. Dec. 340, and has been adopted by this court in

Sheppard v. Yocum, 10 Or. 402; and again in *Osmun v. Winters*, 30 Or. 177 (46 Pac. 782). We may be pardoned if we quote it again: "Any declarations by one of the parties at the time of committing the unlawful act are, no doubt, not only evidence against himself, but, as being part of the *res gestae*, and tending to determine the quality of the act, are also evidence against the rest of the party, who are equally as responsible as if they had themselves done the act. But what one of the party may have been heard to say at any other time as to the share which others had in the transaction, or as to the object of the conspiracy, cannot be admitted as evidence to affect them, for it has been solemnly decided that a confession is evidence only against the person himself who makes the confession, and not against others." The rule is as applicable in criminal as in civil cases. Mr. Wharton says: "When the common enterprise is at an end, whether by accomplishment or abandonment, no one of the conspirators is permitted, by any subsequent act or declaration of his own, to affect the others": Wharton's Criminal Evidence (9th Ed.), § 699.

4. Following the name of George G. Smith on the alleged will there appears what is denominated an acknowledgment of a notary public, which F. R. Muffett, a co-defendant, testified, over the objections of defendant, that he wrote at the suggestion of Edgar, and the action of the court in this regard is assigned as error, upon the ground that when the defendant signed the name of Nancy M. Love to the instrument, the acknowledgment was not appended thereto, and that such act was a subsequent transaction. But there was evidence to go to the jury of a conspiracy to forge this will, and it is a matter of proof for the jury's consideration as to what constitutes the forged instrument in all its parts. If the acknowledgment was appended in pursuance of a common design,

then it was part of the act of forging the alleged will; but if one of the conspirators, without the concurrence of the others, added the false acknowledgment, such act could not be said to be theirs. It was, however, proper for the whole matter to go to the jury, and it was for them to determine the part that the defendant took in the transaction, and thereby fix his guilt or innocence.

5. Lastly, the defendant moved the court for instructions to acquit when the evidence for the state was in, upon the ground that the testimony of the accomplices had not been corroborated by other evidence tending to connect the defendant with the crime charged. This motion was disallowed, and we think rightly, as the evidence of Mr. George, who testified to an acquaintance with the handwriting of the defendant and recognized the name Nancy M. Love attached to the alleged will as being in his hand, was sufficiently corroborative, and tended to connect him with the crime charged. But, there being error in other respects, as hereinbefore noted, the judgment of the court below will be reversed, and the cause remanded for a new trial.

REVERSED.

Argued November 25, 1896; decided February 8, 1897; rehearing denied.

NICKUM v. BURCKHARDT.

(47 Pac. 888.)

PLEADING ESTOPPEL.—A party who has an opportunity to plead an estoppel upon which he relies, and fails to do so, but goes to issue on the fact, waives the estoppel and puts the matter at large, and the jury may disregard the estoppel, and are at liberty to find the truth: *Bruce v. Phoenix Ins. Co.*, 24 Or. 486; and *Bays v. Trulson*, 25 Or. 109, cited and followed.

CORPORATIONS—WHO ARE STOCK SUBSCRIBERS.—One who has signed a preliminary subscription to the capital stock of a corporation, and has signed the consent agreement for the first meeting of stockholders, and actually participated in such meeting, is a stock subscriber, though he has not signed the stock subscription book after the filing of the articles of incorporation: *Coyote*

30	484
41	549
30	484
42	280

Mining Co. v. Ruble. 8 Or. 284, distinguished; *Balfour v. Baker City Gas Co.*, 27 Or. 307, cited and applied.

CHANGING OBJECTS OF CORPORATION—VALIDITY OF ORGANIZATION.—

A subscriber to the stock of a corporation cannot avoid liability upon his subscription on the ground that the purposes designated in the articles of incorporation do not correspond with those set forth in the preliminary subscription, where he participated in the organization under such articles.

VALIDITY OF ORGANIZATION—NOTICE TO SUBSCRIBERS.—

Subscribers who were present and participated in the first meeting of the stockholders of a corporation cannot object that the organization was illegal because certain other subscribers, whose presence was not necessary to make up the requisite representation of half the capital stock, were not notified of the meeting as required by law.

VALIDITY OF CORPORATE ORGANIZATION—NOTICE TO SUBSCRIBERS.—

One who subscribes to the capital stock of a corporation after its apparent organization cannot avoid liability therefor because certain preliminary subscribers, whose presence was not necessary to make up one-half the capital stock required to be represented, were not notified of the first meeting of the corporation.

ESTOPPEL—PRIVITY BETWEEN CORPORATIONS AND THEIR STOCK-

HOLDERS.—A stockholder and his corporation are in privity as to an adjudication against the corporation in matters pertaining to duties it owes its members; but when the corporation sues a delinquent member for his stock subscription, it cannot be said to represent any shareholder, so as to bind him by the result, for it is apparent that in such a case the corporation and the stock subscriber are strictly adversary.

IDEM.—A judgment for defendant in an action by a receiver of a corporation against an alleged stock subscriber, involving the sole issue whether or not he was a subscriber at the date of the attempted organization, is not available as an estoppel against the receiver in a subsequent action to recover an unpaid subscription from another alleged stockholder—in other words, the action of the corporation was against the stockholder sued, and not in defense of his rights or interests, and binds only the parties to it.

From Multnomah: E. D. SHATTUCK, Judge.

This is an action by J. M. Nickum, as receiver of the Oregon Fertilizing Company (a private corporation), to recover from Burckhardt Bros. an amount claimed to be due on a certain alleged subscription to the capital stock of said company. The defendants filed a plea in abatement to the effect that the alleged corporation was never legally organized. On a trial of this issue there was a

judgment for defendants, from which this appeal is taken.

REVERSED.

For appellant there was a brief over the names of *Charles J. Schnabel, Ralph W. Wilbur, and John J. Balleray*, with an oral argument by *Messrs. Schnabel and Wilbur*.

For respondent there was a brief and an oral argument by *Mr. Joseph B. Thompson*.

Opinion by MR. JUSTICE WOLVERTON.

This is an action to recover for assessments levied upon unpaid capital stock of a private corporation. About June 18, 1893, some thirteen persons, among whom were Guy Posson, who signed for two shares; J. E. Juston, for four; F. C. Barnes, for ten; and H. Pease, for three—subscribed the following agreement, each placing opposite his name the number of shares presumably intended to be taken: "We, the undersigned, each in consideration of the promise of the other, agree to subscribe for and take the number of shares of the capital stock set opposite our respective names of a company to be incorporated for the purpose of operating a fertilizer, feeding and fattening stock and poultry; and, if obtainable, collecting and disposing of swill, and other purposes of like nature; said company to be incorporated in accordance with the laws of the State of Oregon, with a capital stock of \$15,000, divided into 150 shares of the value of \$100 each." There were seventy-eight shares subscribed for upon this paper, representing \$7,800. On the 7th day of October, 1893, three of the subscribers executed, duly acknowledged, and caused to be filed and recorded in the proper offices, articles of incorporation, incorporating the Oregon Fertilizing Co., specifying the object and business thereof to be "to transport wood, produce, and garbage, and to crema"

such garbage, or to use the same for feed or fertilizing purposes." A little later, all the subscribers to said instrument, except the four above named, signed with others the following writing, which is contained in a minute book kept for the purpose of recording the proceedings of the corporation, to wit: "We, the undersigned, hereby subscribe for the number of shares of capital stock of the Oregon Fertilizing Company, set opposite our respective names, and agree to pay for the same at such time or times as may be ordered by the board of directors hereafter to be elected." Only sixty-nine shares of the capital stock were subscribed for upon this latter instrument. Subsequently all the subscribers to this instrument, together with Posson and Juston, signed an agreement to hold the first meeting of the stockholders on October 14, 1893, waiving the thirty days' notice required by law, and in pursuance thereof the meeting was held, all said signers being present, either in person or by proxy, but no others, and participated in the election of directors and other business. The corporators having certified to the result of the election, the directors elected took the oath of office, and at once organized by electing the officers of the board. To abate the action, the defendants plead that the plaintiff company is not an incorporation.

It was urged at the hearing that the defendants ought to be estopped from alleging that the Oregon Fertilizing Company is not a corporation duly incorporated and organized in all respects as contemplated by law, inasmuch as they are subscribers or purchasers of stock subsequent to the alleged completed organization of the company; that, having dealt with the company in its corporate capacity, and having entered into contractual relations with it, they have recognized its existence as a body corporate, and that now, when sued upon their obligation to it as such a body, they should not be permitted to deny

its legal existence. The doctrine here contended for is undoubtedly well grounded in the law, but it cannot be invoked in this case because not pleaded. The opportunity was afforded for setting up the supposed estoppel in the reply, but it was not done, and it is now too late to assert it. It is said that "if a party who has an opportunity to plead an estoppel upon which he relies fails to do so, but goes to issue on the fact, he thereby waives the estoppel, puts the matter at large, and the jury may disregard the estoppel, and are at liberty to find the truth": Note to *Tyler v. Hall* (Mo.), 27 Am. St. Rep. 337-346 (15 S. W. 319). To the same effect are *Bruce v. Phoenix Ins. Co.*, 24 Or. 486 (34 Pac. 16); and *Bays v. Trulson*, 25 Or. 109 (46 Am. & Eng. Corp. Cas. 386, 35 Pac. 26).

This question disposed of, we come to another, more complex in its nature, and that is whether there has been an organization of the plaintiff corporation under and in pursuance of the general statutes providing therefor. The regularity of the execution and filing of the articles of incorporation is conceded. The persons subscribing the articles are known as the incorporators, and their powers and duties are purely statutory. They may open books and receive subscriptions to the capital stock; "they shall give notice to the subscribers to meet" at such time and place as they may designate for the purpose of electing directors; they shall act as inspectors at the first meeting for that purpose, certify who are elected, and appoint the time and place of their first meeting. This enumeration comprises the substance of their powers: See section 3222, Hill's Code. These are all acts necessary to and in furtherance of the completion of the organization. The organization is completed only when directors have been elected, and they have elected a president and secretary, which it is contemplated they shall do at their first meeting. From the time of the first meeting of the directors,

that is to say, from the time of the organization of the board, "the powers vested in the corporation are exercised by them, or by their officers or agents under their direction" (Hill's Code, § 3225), thus relieving the incorporators of further duty or power in the premises, or, rather, their functions then cease because their duties have been fulfilled and their powers executed. From the date of its completed organization the incorporation may begin the prosecution of its enterprise or business. It may then sue and be sued, contract and be contracted with, and exercise any of the other statutory powers incident to its organization and the enterprise, business, pursuit, or occupation adopted. The corporation may elect its board of directors when one-half of the capital stock has been subscribed: Hill's Code, § 3222; *Fairview R. R. Co. v. Spillman*, 23 Or. 587 (32 Pac. 688). And one question here is whether one-half of the capital stock had been subscribed when the board was elected. It seems to be supposed that in order to constitute a person a subscriber to the capital stock of a corporation he must have subscribed to the stock books of the concern after its articles of incorporation have been perfected and filed, and *Coyote Mining Co. v. Ruble*, 8 Or. 284, is cited as authority. BOISE, J., at page 294, says, in effect, that to put a person in the position of a subscriber to the capital stock it must be shown by the stock book signed by him, or evidence equivalent to such signing. This would seem to support the proposition, but at another place (page 298) he says: "It is necessary for the corporation to prove the subscription by producing the subscription signed by Ruble, either by himself or by another for him with his authority, or by some acts of his which are equivalent to a subscription." So that the case does not decide either that the primary subscription must be made upon the stock book, or that it shall have been made subsequent to the execution of

the articles of incorporation. In a late case (*Balfour v. Baker City Gas Co.*, 27 Or. 307, 41 Pac. 165), BEAN, C. J., speaking for this court, says: "From an extended examination of the authorities we take the law to be that when the proposed corporation is formed as contemplated in the preliminary subscription, and within a reasonable time thereafter, the subscription, unless revoked in the manner authorized by law, becomes irrevocable, the subscriber becomes a shareholder, and liable as such without any further act on his part." And this seems to be so, although the statute may provide for the opening of stock books by designated persons after the articles are filed: *Id.*; 1 Thompson on Corporations, §§ 1152-1166; *Buffalo R. R. Co. v. Gifford*, 87 N. Y. 294. Nor is the distinction taken in some of the cases between a present subscription and an agreement to subscribe to the stock of a corporation thereafter to be created thought to be sound: 1 Cook on Stocks and Stockholders, § 75; *Knox v. Childersburg Land Co.*, 86 Ala. 180-184 (5 South. 578); *Athol Music Hall Co. v. Carey*, 116 Mass. 471. Now, it appears that by the preliminary subscription seventy-eight shares of the capital stock were signed for, three more than was necessary for the completion of the organization by the election of directors. Four of the individuals signing this paper, representing nineteen shares, did not sign the later agreement, to which sixty-nine shares only were subscribed. All those subscribing the latter paper, together with Guy Posson and J. E. Juston, who signed the preliminary subscription, signed the consent agreement for holding the first meeting, and participated therein, and Juston was elected a director. So it will be seen that if the two shares of Posson and the four of Juston are added to the sixty-nine shares signed to the second paper, one-half of the capital stock was represented at such meeting. But the question arises, Were they subscribers to the

capital stock? We think that, having signed the preliminary subscription and the consent agreement for the first meeting, and having participated therein, they became bound in that capacity, and must be so considered. They certainly are estopped by their acts from denying that they are subscribers, and, this being so, the law requiring a subscription of one-half of the capital stock before organization was substantially complied with.

Incidental to this question, it is argued that the purposes designated in the articles of incorporation do not correspond with those set forth in the preliminary subscription, and therefore that Posson and Juston cannot be held to be subscribers. We presume that ordinarily a material departure in this respect will avoid the original agreement, but in this case the persons named have construed the purposes to be one and the same by participation in the organization under the articles of incorporation, or, rather, to speak more concisely, they have assented to the departure, if such it may be termed: *Knox v. Childersburg Land Co.*, 86 Ala. 180 (5 South. 578).

Again, it is urged that if the primary subscription is sufficient to bind the subscribers to the capital stock of the concern, then, Barnes and Pease not being present, and having no notice of the first meeting, and not having waived the same by writing or otherwise, the election of directors was irregular and void. We are not to be understood as passing upon the sufficiency of this paper within itself, but that, considering the subscription thereto of Posson and Juston, in connection with their subsequent acts, they were properly recognized as stockholders, and hence that one-half of the capital stock was represented at the organization of the company. The fact that Barnes and Pease had not been notified of the meeting could not furnish grounds for objection by those subscribers present and participating therein; they have not

suffered by the omission, and are not in a position to object as to others: *Schenectady R. Co. v. Thatcher*, 11 N. Y. 102. See also *Handley v. Stutz*, 139 U. S. 422 (11 Sup. Ct. 530); Morawetz on Private Corporations, § 399. Thus we have an organization perfected by persons bound as subscribers, and representing fully one-half of the capital stock as fixed by the articles of incorporation, and all bound by its proceedings. We think the organization valid, although Barnes and Pease were not notified. As to how they would be affected by want of notice it is not for us to determine at this time; it is sufficient to say that those subscribers participating cannot object on that account.

The defendants, if subscribers to the capital stock, became such after the organization, and the want of notice to Barnes and Pease could not affect them; so that they are in no better position to object to the regularity of the organization on that account than those participating in the first meeting. The result is that, in so far as they are concerned, the company was duly incorporated, and this result is reached, not because they are estopped by having dealt with it, but because it was legally organized prior to their subscription to the capital stock.

For the purpose of estopping the plaintiff from asserting its due and legal organization, it is alleged in the answer in abatement that plaintiff had theretofore instituted an action in a justice's court against Guy Posson for assessments made by the company upon his alleged subscription to the capital stock; that a trial was had upon the sole issue whether Posson was a subscriber at the date of the attempted organization; and that it was determined by the judgment that he was not. It is claimed that, as the same question is necessarily involved in determining in this action whether the plaintiff was duly organized, the plaintiff is estopped to assert its truth, the judg-

ment having gone against him in the justice's court. The plea is argumentative, and avers in effect that, as the judgment in the justice's court estops the plaintiff to now assert that Posson is a subscriber, therefore it cannot be affirmed that the corporation is duly organized. That this is an action upon a different cause from the one against Posson cannot be gainsaid; the injury, therefore, to which the estoppel is pertinent must be confined to the point or question actually determined in the Posson case: *Cromwell v. County of Sac*, 94 U. S. 353. Thus far, the plea is apparently within the rule. But a very important essential to the estoppel is wanting in that this cause and the one adjudicated in the justice's court are not between the same parties in the same right or capacity, or their privies claiming under them. This objection is fatal to the plea: 1 Freeman on Judgments, § 252. The judgment of the court below must therefore be reversed, and the cause remanded for such further proceedings as may be deemed proper not inconsistent with this opinion.

REVERSED.

Decided April 19, 1897.

ON MOTION FOR REHEARING.

(48 Pac. 474.)

Opinion by Mr. JUSTICE WOLVERTON.

Since the opinion was rendered in this cause, we have been favored with an elaborate brief upon respondents' motion for a rehearing, urging with commendable earnestness that the court is in error in holding that the plaintiff is not estopped to prosecute this action by reason of the judgment rendered and given in Posson's favor in the justice's court. In our anxiety to be right, we have at much pains re-examined the question, but find no reason for receding from our former position. One line

of authorities relied upon in support of the motion establishes the doctrine clearly stated by Chief Justice FULLER in *Hawkins v. Glenn*, 131 U. S. 332, that "A decree against a corporation in respect to corporate matters, such as the making of an assessment in the discharge of a duty resting on the corporation, necessarily binds its members, in the absence of fraud, and that this is involved in the contract created in becoming a stockholder." The estoppel which was invoked with success in that case was a decree of a chancery court in a creditor's suit against a corporation, whereby an assessment was levied against the stockholders. It was urged that as the stockholders were not made parties to the suit, nor served with summons, they were not to be bound by the decree; but it was decided that they were represented by the corporation, and that the assessment by decree took the place of a regular assessment by the board of directors, and, therefore, that it was unnecessary to make them parties to the suit, or serve them, but that they were bound by the decree, because they were integral parts of the corporation, and in view of the law they were privy to the proceedings touching the body of which they were members. Such is the effect also of *Glenn v. Liggett*, 135 U. S. 533; *Lehman v. Glenn*, 87 Ala. 618; *Howard v. Glenn*, 85 Ga. 238, 21 Am. St. Rep. 156; and *Glenn v. Williams*, 60 Md. 93. All these cases, including *Hawkins v. Glenn*, 131 U. S. 332, are concerning different phases of the same transaction, but the courts are in accord upon the proposition stated. *Stutz v. Handley*, 41 Fed. Rep. 531, is a case by a creditor of a corporation, instituted in behalf of himself and all others similarly situated, against a stockholder, to subject the amount remaining unpaid upon shares of the capital stock held by him to the payment of the company's debts. The creditor had previously obtained judgment against the

company for the price of certain machinery, against which it had interposed a counterclaim for damages by breach of warranty, which was disallowed, and the stockholder attempted to again counterclaim for the same breach, but it was held that he was precluded by the judgment in the action against the company upon the ground and for the reason that he was represented by the company in that action, and had already had his day in court on that question. *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, was a suit similar to *Stutz v. Handley*. A judgment had been recovered against the company upon its contract, and in the creditor's suit a stockholder attempted to show that the contract was one which the corporation was without power to make, and therefore ultra vires and void, but the court held that he was precluded by the judgment in the action against the corporation. In deciding the question, DE HAVEN, J., said: "A corporation represents and binds its stockholders in all matters within the limits of its corporate power, so long as it acts in good faith and without fraud upon their rights; and in the bringing and defending of suits affecting the rights and obligations of the corporation, it binds the stockholders as fully as in the making of contracts."

Willoughby v. Chicago Junction Railway Co., 50 N. J. Eq. 656, was a case instituted by plaintiff in behalf of themselves and all others similarly situated who should come in and be made parties to the suit, in deciding which the court said: "From the very form and nature of these suits, each stockholder must be considered as represented; for if he is in sympathy with the complainant he may become a party complainant by application to the court, if he is in sympathy with the threatened action of the company, he is represented by and in the corporation, which is a necessary party to the suit." This was held to fall within a class of cases where a duty is incumbent upon

the corporation, but, failing to take action in the premises, a stockholder is permitted to prosecute as the nominal party, but representing the corporation as the real party, in the place and stead of the accustomed officials. In all these cases it will be seen that the stockholders are bound by the judgment or decree against the corporation in matters pertaining to the duties of the corporation touching its rights and obligations with which it is charged as the representative of the individual stockholders, who may be regarded in that respect as integral parts of the body corporate, and this is as far as the estoppel extends. But in an action by the corporation against a stockholder to recover for stock assessments, while it may be said that the corporation is acting in discharge of a duty imposed upon it by the stockholders through the articles of incorporation and by-laws, the defendant is, from the very nature of things, an adversary party in the fullest sense of the word. The corporation cannot be said to represent the stockholder while prosecuting an action against him to enforce the payment of a stock subscription which he is resisting. But a stockholder who has no action pending against him for the enforcement of his unpaid stock bears the same relation to the corporation, is bound or obligated to it by a contract of like nature and effect, and his rights and duties toward the company and all other stockholders are identical with the one resisting, so that if, in such a case, it does not represent the stockholder against whom the action is being prosecuted, can it be consistently or logically said to represent such as have not actions pending against them, in so far as to conclude them in their individual capacities and touching their obligations to the corporation? Mr. Van Fleet says: "In order to conclude any right, title, or interest of a person by adjudication, it is essential that he be a party to the proceeding, or be represented by one. In the latter case

he is said to be a privy": 2 Van Fleet on Former Adjudication, § 459. And it is because the stockholder is represented by the corporation that he is precluded by a judgment or decree rendered against it; but if the proceeding is one in which the stockholder and the corporation are adversary parties, the reason of the rule ceases, for in such case the corporation does not and cannot represent the stockholder. Suppose the judgment in the justice's court had gone against Posson, and it had been there determined that he was a subscriber to the capital stock of the concern, would it be contended for a moment that the defendant in this action would be precluded by that judgment when he at the same time was contesting the legality of the organization of the company upon the very ground that Posson was not a stockholder in an action of the same nature? In what way could it be said that the defendant here was in privity with Posson, and, if not in that event, why should he be when the judgment is rendered against the corporation? Stockholders are not in privity with the corporation as it pertains to actions prosecuted by it against them for the recovery of unpaid stock subscriptions, for the very cogent reason that they and the company are always adversary parties in such actions, and a priori they are not in privity with each other, as such privity must depend upon the corporate function to represent the stockholders, which does not nor cannot exist. The motion will be denied.

REHEARING DENIED.

Argued April 25; decided August 5, 1895.

GROSSMAN v. CITY OF OAKLAND.

(— L. R. A. —; 41 Pac. 5.)

1. **LIMIT OF MUNICIPAL POWER OVER NUISANCES.***—Under a charter giving to the city the power to prevent and restrain nuisances, and "to declare what shall constitute a nuisance," an ordinance absolutely prohibiting a railroad company from fencing its track in the platted portion of the city, and declaring such fence a nuisance, is void, since the city cannot assert a particular use of property to be a nuisance, unless such use comes within the common law or statutory idea of a nuisance, or is so in fact.
2. **EFFECT OF PLEA OF GUILTY—CRIMINAL LAW.**—A plea of guilty to a charge of violating a city ordinance is only an admission that defendant committed the acts charged, and is immaterial where the ordinance is void.

From Douglas: J. C. FULLERTON, Judge.

S. Grossman, having pleaded guilty before the recorder of the City of Oakland of violating a certain ordinance, prosecuted a writ of review to the Circuit Court. His proceeding was dismissed, and he appeals.

REVERSED.

For appellant there was an oral argument by *Mr. Wm. D. Fenton*, with a brief over the name of *Bronaugh, McArthur, Fenton & Bronaugh*, urging these points:

The ordinance is void, because it is not within the police power of any city to declare that to be a nuisance

*NOTE.—This case is reprinted in — L. R. A. —, with a considerable note on the Power of Municipal Corporations to Define, Prevent, and Abate Nuisances. Legislatures, municipal corporations, or boards of health cannot declare particular things to be nuisances which in reality are not: *Tissot v. Great Southern Telegraph Co.*, 4 Am. St. Rep. 248; *Village of Des Plaines v. Poyer*, 5 Am. St. Rep. 524; *Ex parte O'Leary*, 7 Am. St. Rep. 640; *City of Janesville v. Carpenter*, 20 Am. St. Rep. 123; *Ex parte Neill*, 40 Am. St. Rep. 776; *First Nat. Bank v. Sarlls*, 28 Am. St. Rep. 185. There is a modification of the foregoing rule to the effect that in doubtful cases, where a thing may or may not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the municipal

which was not so at common law or which is not so in fact: 15 Am. & Eng. Enc. Law (1st Ed.), 1166; Cooley on Constitutional Limitations (6th Ed.), 741, note; *Everett v. Council Bluffs*, 46 Iowa, 67; *Butchers' Union v. Crescent City*, 111 U. S. 746; *Wynehamer v. People*, 13 N. Y. 378; *Village v. Poyer*, 123 Ill. 348 (14 N. E. 677, 5 Am. St. Rep. 524); *Railroad Co. v. City of Joliet*, 79 Ill. 44; *Yates v. Milwaukee*, 77 U. S. (10 Wall.), 503; *State v. Mott*, 61 Md. 297 (48 Am. Rep. 105); *Ward v. Little Rock*, 41 Ark. 526 (48 Am. Rep. 46).

This ordinance is invalid for that it attempts to conclusively declare that a nuisance which is not in itself injurious to the public health, the public morals, or the public safety, and which is not a nuisance at common law or in fact, and which is an entirely legal act under the laws of the State. It is beyond the power of any municipal corporation or legislative body to declare the act of inclosing one's own property by a fence, or the exercise of dominion over one's own property, to be an offense or a nuisance. Whether the particular use of private property constitutes a nuisance is a judicial and not a legislative question: 15 Am. & Eng. Enc. Law, pp. 1178-1180, note; 1 Dillon on Municipal Corporations (3d Ed.), § 325; 33 Central Law Journal, 382; note to *Milne v. Davidson*, 16 Am. Dec. 195; note to *Robinson v. Franklin*, 34 Am. Dec. 627; *River Ren-*

authorities in exercising legislative functions, their action will be conclusive: *Harmison v. City of Lewiston*, 46 Am. St. Rep. 893.

The legislature may enlarge the list of public nuisances, and declare places or property used to the injury of the general health, morals, or welfare to be public nuisances, although not so at common law: *Lawton v. Steele*, 16 Am. St. Rep. 813 (7 L. R. A. 134); and property used in the maintenance of nuisances may be destroyed if necessary for their abatement: *Lawton v. Steele*, 119 N. Y. 226, 152 U. S. 133 (16 Am. St. Rep. 813, 7 L. R. A. 134); *First Nat. Bank v. Sarlls*, 28 Am. St. Rep. 185.

With the case of *City of Richmond v. Dudley*, 28 Am. St. Rep. 184 (13 L. R. A. 587), is a collection of authorities to the effect that a municipal ordinance must be reasonable, must be consonant with the powers and purposes of the municipality, and not inconsistent with the laws of the state.—REPORTER.

dering Co. v. Behr, 77 Mo. 98 (46 Am. Rep. 6); *Hennessy v. City of St. Paul*, 37 Fed. 565; *Denver v. Mullen*, 7 Colo. 345 (4 Am. & Eng. Corp. Cas. 304); *Wreford v. People*, 14 Mich. 41; *Lake View v. Letz*, 44 Ill. 81; *Chicago v. Laflin*, 49 Ill. 172; *Allison v. Richmond*, 51 Mo. App. 133; *Teass v. St. Albans* (W. Va.), 17 S. E. 400; *Cole v. Kegler*, 64 Iowa, 59; *Pieri v. Shieldsboro*, 42 Miss. 493; *Frank v. Atlanta*, 72 Ga. 428.

In the following cases it is held that a municipal ordinance which assumes to declare and punish an ordinance, or to create an offense in too broad and sweeping terms, so as to prevent the exercise of a lawful right, or to impose unreasonable restrictions upon the lawful use of property, is void: *Ex parte O'Leary*, 65 Miss. 80 (7 Am. St. Rep. 640); *City of St. Paul v. Gilfillan*, 36 Minn. 298; *Ex parte Sing Lee*, 96 Cal. 354 (24 L. R. A. 195, 31 Am. St. Rep. 218); *Ex parte Whitwell*, 98 Cal. 73 (19 L. R. A. 727, 35 Am. St. Rep. 152); *In re San Kee*, 31 Fed. 680; *In re Tie Loy*, 26 Fed. 611; *Laundry Case*, 7 Sawy. 528; *Greenlow v. Ehrenreich*, 80 Ala. 579; *City of Sioux Falls v. Kirby*, 60 N. W. 156 (25 L. R. A. 621).

Any ordinance which, in effect, prevents the right of building on private property, under peril of punishment, is void, as taking property without due process of law, and without compensation: *St. Louis v. Hill* (Mo.), 22 S. W. 861 (21 L. R. A. 226); *Newton v. Belger*, 143 Mass. 598; *Quintini v. Mayor*, 64 Miss. 485 (60 Am. Rep. 62); *Evansville v. Martin*, 41 Ind. 45.

The police power does not extend to depriving any person of the lawful use of property without due process of law, and without compensation: *Matter of Jacobs*, 98 N. Y. 110 (50 Am. Rep. 636); *Matter of Cheesbrough*, 78 N. Y. 232; *Rockwell v. Nearing*, 35 N. Y. 302.

The ordinance in question violates all the principles enunciated in the foregoing decisions. It does not pur-

port to prevent the obstruction of public streets, or allude to streets or highways in any manner. By its broad and comprehensive terms, it precludes the building of any fence to separate the land of the railroad company from the private lands of other persons, and purports to deprive it of the right to build upon its own property, when not interfering with any public right. Such an ordinance transcends the just limits of police power, and is wholly void.

For respondent there was an oral argument by *Mr. J. W. Hamilton*, and a brief to this effect:

Our city governments usually possess the power, either by express grant or by virtue of their authority, to make by-laws relating to the public safety and good order; the route on streets over which omnibuses, stage coaches, drays, etc., may run. Public safety and convenience may require regulations of this character: 1 *Dillon on Municipal Corporations*, §§ 393, 396.

A city government, under the usual grants of power, has the general authority to so regulate the use and enjoyment of private property in the city as to prevent its proving pernicious to the citizens generally, and may, when the use to which the owner devotes his property becomes a nuisance, compel him to cease so to use it, and punish him for refusing to obey its ordinances and regulations concerning such use. 1 *Dillon on Municipal Corporations*, 468; *Louisville City Ry. Co. v. Linisrilk*, 8 Bush. (Ky.) 415.

Under a grant of authority to construct its track along a street, a railroad company cannot monopolize a street to the exclusion of the public and private uses to which it is applied: 6 *Am. & Eng. Enc. Law*, 535, 536; *Farrand v. Chicago & Northwestern R. R. Co.*, 21 Wis. 438.

The right to fence within the city limits does not exist.

The mere inconvenience to the company by no means governs in determining whether there exists a right to fence. This has little if any weight. The public convenience, the public interest, the spirit and policy of the statute are to be considered: *Davis v. Burlington & Missouri River R. R. Co.*, 26 Iowa, 555, 557.

There is no common right to do that which by a valid law or ordinance is prohibited, and hence courts will not declare an authorized ordinance void, because it prohibits what otherwise might be lawfully done: 1 Dillon on Municipal Corporations, § 326.

If an ordinance is general in its application, the mere fact that it peculiarly affects a particular person raises no presumption that it was enacted for the purpose of annoying him, or depriving him of his rights: *Shrinkle v. Covington*, 83 Ky. 420.

Ordinances may be adapted to the varying municipal necessities and exigencies: *Covington v. St. Louis*, 78 Ill. 548.

A city ordinance may regulate the exercise of a common right, provided the regulation is not unreasonable: *Com. v. Patch*, 97 Mass. 221.

Opinion by Mr. CHIEF JUSTICE BEAN.

On June 12, 1894, the petitioner was arrested on a warrant of the Municipal Court of the City of Oakland, issued upon a complaint charging him with having "committed a public nuisance within the platted portion of said city, by driving stakes as a part of the fence which he was then and there building along the side of the O. & C. Railroad, otherwise known as the Southern Pacific Railroad, contrary to ordinance No. 58 of the city," and on a plea of guilty was fined \$25. He thereupon sued out a writ of review to have the judgment of the recorder's

court annulled and set aside, on the ground that the ordinance was void. The writ being dismissed by the Circuit Court, he brings this appeal. The ordinance in question was passed by the Oakland council June 11, 1894, for the declared purpose, as shown by the minutes of the meeting, of "prohibiting the Southern Pacific Railroad Company from building a fence along their railroad within the corporate limits of the city," and provides: "That it shall be unlawful for any person, association, or corporation, owning, operating, or controlling any railroad within the corporate limits of the City of Oakland, Oregon, or any person or persons in the employment of any such person, association, or corporation, or any other person whatever, to build, construct, or maintain any fence or other obstruction whatever along the side of any such railroad within the portion of the corporate limits of said City of Oakland that is laid out in lots and blocks, and every such fence and obstruction is hereby declared a nuisance within and against the ordinance of said City of Oakland."

1. In our opinion this ordinance cannot be sustained as a legitimate exercise of municipal power. The charter of the city confers upon it the power to prevent and restrain nuisances, and to "declare what shall constitute a nuisance"; but this does not authorize it to declare a particular use of property a nuisance, unless such use comes within the common law or statutory idea of a nuisance: 2 Wood on Nuisances (3d Ed.), 977; *Yates v. Milwaukee*, 77 U. S. (10 Wall.) 497; *Village of Des Plaines v. Poyer*, 123 Ill. 348 (5 Am. St. Rep. 524, 14 N. E. 677); *Quintini v. City Board of Aldermen*, 64 Miss. 483 (60 Am. Rep. 62, 1 So. 625); *Chicago & Rock Island R. R. Co. v. City of Joliet*, 79 Ill. 44; *Hutton v. City of Camden*, 39 N. J. Law, 122 (23 Am. Rep. 203). By this provision of the charter the city is clothed with authority

to declare by general ordinance under what circumstances and conditions certain specified acts or things injurious to the health or dangerous to the public are to constitute and be deemed nuisances, leaving the question of fact open for judicial determination as to whether the particular act or thing complained of comes within the prohibited class; but it cannot by ordinance arbitrarily declare any particular thing a nuisance which has not heretofore been so declared by law, or judicially determined to be such: *City of Denver v. Mullen*, 7 Colo. 345 (4 Am. & Eng. Corp. Cas. 304, 3 Pac. 693). An ordinance of the city cannot transform into a nuisance an act or thing not treated as such by statutory or common law, nor can it prohibit the free use of property by the owner, so long as such use does not interfere with the rights of others. Every proprietor has a constitutional right to erect upon his property such buildings or other structures as he may deem necessary for its enjoyment, having due regard for the rights of others, and this is a vested right guaranteed by the constitution, and cannot be arbitrarily interfered with. It is true one cannot lawfully use his property in such a manner as to injure another, but a particular use which may or may not result in creating a nuisance according to circumstances cannot be declared such in advance. The question when it may or may not become a nuisance within some provision of law must be settled as one of fact and not of law. Now, the fencing of a railway track in the platted portion of a city can ordinarily work no more harm or injury to others than the fencing of private property, and it would not for a moment be contended that an ordinance prohibiting a private citizen from fencing his property regardless of the character of the fence would be valid. The fencing or enclosing of property is a lawful and harmless use, in itself, and does not become a nuisance because the municipal authorities

have so declared, unless it is so in fact by reason of the character of the structure or the place of its erection; and in such case the ordinance should be directed against the unlawful and not the lawful act, leaving it to be judicially determined whether the particular structure is in fact a nuisance, either by reason of its character or the place of its erection. But the ordinance in question is not directed to the prohibition of such fences or structures, as may by reason of their character or location be a nuisance, but it absolutely prohibits a railroad company from in any manner fencing or enclosing its track in the platted portions of the city, although the fence may be upon its own property, acquired by purchase or condemnation, and although it may be necessary to do so as a protection to its servants or the traveling public, and, in our opinion, is manifestly void: Tiedeman on Limitations of Police Power, § 122a.

2. It is contended, however, that by his plea of guilty the petitioner has waived the right to insist in this proceeding that the ordinance is void; but the plea of guilty is only an admission that the defendant committed the acts charged in the complaint, and, unless such acts constitute an offense or are in violation of some valid ordinance of the city, his admission was not material, and he waived nothing thereby: *Fletcher v. State*, 12 Ark. 169. It follows that the judgment of the court below must be reversed.

REVERSED.

Decided at PENDLETON July 31, 1897.

HOUSER v. UMATILLA COUNTY.

(49 Pac. 867.)

30	486
40	212
30	486
46	34

SHERIFF'S FEES—EXPENSES OF TRAVEL—SALARY.—Under the language and intent of the act of 1895 fixing the compensation of sheriffs and other county officers (Laws 1895, p. 77), a sheriff cannot claim from the county the expenses of travel within his jurisdiction while serving processes of the state in criminal cases.

From Umatilla: STEPHEN A. LOWELL, Judge.

This is a proceeding by a writ of review to determine the propriety of a certain claim filed by the sheriff against Umatilla County for expenses incurred while serving within such county grand jury subpoenas and other criminal processes on behalf of the public prosecutor. The bill is composed entirely of such items as "Railroad fare to Umatilla and return, \$3.45; team hire at Milton, \$3.00; hotel bill, \$1.00; railroad fare of officer and prisoner, \$3.00." The County Court refused to audit or allow any such items, but the Circuit Court reversed the ruling, and the county brings the case here.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Henry J. Bean*, District Attorney.

For respondent there was a brief over the name of *Carter & Raley*, with an oral argument by *Mr. James H. Raley*.

Opinion by MR. CHIEF JUSTICE MOORE.

This is a special proceeding by Zoeth Houser to review the action of the County Court of Umatilla County in the matter of its refusal to allow his claim, amounting to the

sum of \$35.75, for money expended on account of railway fares, livery hire and hotel bills while in the performance of his official duties within said county as the sheriff thereof. The trial court having found, from the return to the writ, that the claim was a just charge against the county, reversed the action of the County Court, and remanded the proceedings with directions to audit and allow the said claim, from which judgment the defendant appeals to this court.

Counsel for the defendant contend that, the legislative assembly having provided an annual salary for the sheriff, the expenses constituting his claim are covered thereby; while counsel for the plaintiff insist that such salary is intended to compensate him for personal services only, and that it is the duty of the County Court to repay the expenses incurred while serving criminal process and similar writs within said county. It is admitted that the claim presented correctly represents the amount paid out by the sheriff while in the performance of his official duties in behalf of and within Umatilla County, and the question presented for consideration is whether the County Court has authority to audit and allow the demand. If such authority exists, it must be deducible from a construction of the act of the legislative assembly approved February 25, 1895 (Laws 1895, p. 77). Section 4 thereof provides that "The sheriffs of the several counties in this State shall receive an annual salary as follows: * * * Umatilla, \$2,500.00." Section 5 is as follows: "The salaries herein provided for in favor of the said county clerks, recorders of conveyances, clerks of the Circuit and County Courts and sheriffs, shall be audited and paid by the several counties to the respective parties entitled thereto, in monthly payments, and in the same manner that other county charges are paid; and no one of such officials shall be entitled to receive any fees or other compensation for his

services than as above provided, and except as hereinafter provided, except for furnishing to private parties copies of the records and files in his office for their benefit and convenience, in which case he shall be entitled to charge such private parties therefor at the rate of ten cents a folio, but shall not be entitled to anything for authenticating such copies, beyond including the number of words contained in the certificate of authentication in his computation of the number of folios." So much of section 6 as is applicable to the case at bar is as follows: "The sheriffs of the several counties in the State shall be entitled to receive the same compensation now allowed by law for the board and keeping of prisoners confined in the county jail of his county; he shall also be entitled to demand and receive to his own use any reward offered in pursuance of law for the apprehension of any person charged with or suspected of crime, when he has earned the same by a compliance with such offer; and to receive from the State the fees now allowed by law for transporting and conveying convicts to the State penitentiary and insane or idiotic persons to the State asylum, when conveyed by him in pursuance of the adjudication of an authorized tribunal of the State. Sheriffs shall also be entitled to claim from the plaintiff or moving party in any account, action, or proceeding such reasonable sums of money as they may have been compelled to pay or incur on the account of the care of property in their custody under attachment, execution, or proceedings for the claim and delivery of personal property. When sheriffs are required to travel in another county or state to make arrests or receive a prisoner already in custody, he shall receive, upon filing with the county clerk an expense account duly rendered, his actual and necessary expense incurred in making such arrest and in retaining such prisoner, to be audited in like manner as other claims against the county."

The point contended for by counsel for the plaintiff is that the language of section 5, *supra*, to the effect that no sheriff shall be entitled to receive any fees or other compensation for his services, etc., is a declaration that such officer is to be paid the sum awarded by the act in question for his time and personal services in the discharge of his official duties, but that it is susceptible of the construction that when he is obliged to travel from the county seat in the service of process on behalf of and within his county, the expenses thereby incurred are to be charged to and paid by the county, and, the statute not having made provision for the payment of these expenses, it is incumbent upon the County Court to reimburse him therefor: Section 2356, Hill's Code. It must be admitted that the legislative assembly possesses plenary authority to prescribe the compensation of the various county officers of the State, and to regulate the time, mode, and manner of its payment; but the rule is inflexible that the right of an officer to demand expenses incurred by him in the performance of official duty must be found in the statute conferring it, either directly or by necessary inference: *Jackson v. Siglin*, 10 Or. 93; *Pugh v. Good*, 19 Or. 85 (23 Pac. 827). "The word 'salary,' as used in the statute," says SCHOLFIELD, J., in defining the term under an act similar to the one in question, "clearly applies to the personal compensation provided to be paid to the sheriff for his own services": *Marion County v. Lear*, 108 Ill. 343. To the same effect see *Briscoe v. Clark County*, 95 Ill. 309. The word "salary," as used in the statute under consideration, doubtless means the compensation prescribed to be paid to a public officer for the personal discharge of the duty enjoined upon him by law. If this definition be correct, it might seem to follow that an incumbent of a public office, whose salary is prescribed by the statute, is under no legal obligation to pay the expenses incident to the

performance of his official duty, but, having done so, the claim would be a charge against the county, which the County Court should audit and allow; but if we assume this to be the rule of interpretation, is not its application modified and limited by the other provisions of the statute, which must be construed in *pari materia*? It is claimed, however, by counsel for the defendant, that the provision contained in section 6, that "When sheriffs are required to travel in another county or state to make an arrest or receive a prisoner already in custody, he shall receive, upon filing with the county clerk an expense account duly rendered, his actual and necessary expense incurred in making such arrest, and in returning such prisoner, to be audited in like manner as other claims against the county," is an implied prohibition against the allowance of any expenses incurred in consequence of travel imposed upon the sheriff in the performance of any official duty in his own county, and that, construing this provision with the other portions of the statute, it is very evident that the legislative assembly never intended that the sheriff should receive any compensation for his personal expenses, except when necessarily compelled to travel in territory outside his own county. "Exceptions," says Judge Sutherland, in his valuable work on Statutory Construction, § 328, "strengthen the force of a general law, and enumeration weakens it, as to things not expressed." In *Parsons v. Waukesha County*, 83 Wis. 288 (53 N. W. 507), the county board of said county, prior to plaintiff's election as sheriff, but, pursuant to the provisions of the statute of Wisconsin, changed the compensation of that officer from a fee-bill system to a salary of \$2,500 per annum, in lieu of all fees and compensation which might have been charged under the former method. The plaintiff, having presented to the board of supervisors a bill for livery expenses incurred in serving subpoenas upon wit-

nesses for the state in criminal cases in said county, and similar services, the claim was rejected, whereupon an action was instituted, for the recovery of the amount demanded, and, judgment having been rendered against the plaintiff, upon appeal therefrom PINNEY, J., in rendering the decision of the court, says: "The object of the statute, and of the action of the county board under it, was to give a gross sum in lieu of specific fees, but not to open the door for the sheriff to make charges against the county not theretofore authorized or allowed by law. This construction is strengthened by the exception from the effect of the law and resolution under it of 'compensation for keeping and maintaining prisoners in the common jail.' The law having made no other exception, the court can make none. * * * The salary provided, of \$2,500, is in lieu of such fees or charges, as well as all others, with the exception mentioned in chapter 53, Laws 1881, and no other exception can be allowed. The appellant having taken office while the resolution was in force, must be content to bear the burdens while receiving the benefits arising under it. It is plain that he has no claim against the county for any of the items demanded." It is true that the statute referred to in that case (Laws Wisconsin 1881, p. 55) provides that the salary, when fixed by the board of supervisors, should be in lieu of all fees and compensation for the sheriff, etc., for which service the county was then liable, "except compensation for keeping and maintaining prisoners in the common jail"; and it is very properly held that, as the county, prior to the change in the system, was not liable for the expenses of the sheriff incurred in the service of process, so, under the language of the act, it would not be subject to such charges after the change, and the case is here cited only to illustrate the rule that "enumerations weaken the force of the general law as to things not expressed."

It is nowhere provided in the act of February 25, 1895, that a sheriff shall be allowed, in addition to his salary, any expense incurred for traveling in his own county, and, unless this liability is necessarily inferred from the language of the statute, the County Court is without authority to reimburse him for such outlay. It is claimed, however, that if the plaintiff is obliged to defray his necessary traveling expenses while in the performance of his official duties, it will exhaust the amount awarded him as salary; and, as it must be presumed that the legislative assembly intended that county officers should receive a fair compensation for their services, the statute should receive such a construction as would carry into effect the legislative intention. It may be assumed that the legislative assembly intended by the act in question to award reasonable compensation to the county officers for the discharge of their respective duties, but it must be admitted that there are some inequalities in the amount appropriated as salary to the sheriffs of the several counties, some not being adequately compensated, and the amount prescribed for this officer in Umatilla County doubtless comes within this latter class. Such being the case, if the statute receives the construction invoked, while it would fairly compensate a few officers for their services, in all other cases it would greatly augment the fair compensation the sheriffs of all other counties are now receiving, and, in view of the consequences which must necessarily follow such an interpretation of the statute, it would seem that the remedy for the correction of the error complained of was to be found by application to the legislative assembly for an increase in the salary prescribed.

Counsel for plaintiff, in support of the construction sought, rely upon the rule announced by the Supreme Court of Illinois, from which it appears that the constitution of that state authorizes county boards to fix the com-

pensation of all county officers, with the amount of their necessary clerk hire, stationery, fuel, "and other expenses," and in all cases where fees are provided for, said compensation shall be paid only out of, and shall in no instance exceed, the fees actually collected. Salaries only having been prescribed under this provision of the constitution, a sheriff whose compensation had been thus fixed by a county board presented his claim for expenses incurred in the performance of official duties, and, in *Wheelock v. People*, 84 Ill. 555, the court, in discussing the question, say: "Should the construction insisted upon be adopted, that the \$1,500 appropriated to the sheriff as 'compensation' also includes allowances for necessary expenses of the office, then, according to the averments in the seventh plea, admitted by the demurrer to be true, the sheriff would not only receive no compensation for his personal services, but would be a heavy loser by having accepted and performed the duties of the office. That, certainly, was not the intention of the county board, and we are unwilling to give any such unreasonable construction to the order of December 5, 1872, in relation to the sheriff's compensation, as would work such palpable injustice." It will be observed that the constitution provided that county boards might make provision for "other expenses," and, such being the case, the court very properly held that where salary only had been prescribed, the officer was entitled to his expenses in addition thereto; but it will be seen that our statute contains no such provision, in the absence of which we conclude the salary prescribed was intended to cover all expenses except such as are enumerated in the act in question. It follows that the judgment is reversed, and the writ dismissed.

REVERSED.

Argued October 20; decided December 21, 1896; rehearing denied.

IN RE JOHN'S WILL.
(36 L. R. A. 242; 47 Pac. 341.)

PROBATE OF WILL APPOINTING EXECUTOR.—A will that appoints an executor is entitled to probate, regardless of whether it purports to dispose of anything or not.

CONCLUSIVENESS OF ORDER PROBATING WILL.—It sometimes happens that in proceedings to probate a will, other issues are tendered and heard besides those ordinarily involved (i. e., testamentary capacity and formality), and when such are heard and determined, they will become conclusive between the parties involved.

JURISDICTION OF COUNTY COURTS TO CONSTRUE WILLS.—CODE, §§ 895, 1191.—A court having power to control the conduct of executors, to settle their accounts, to direct the payment of debts and legacies, and to distribute estates, such as is conferred by sections 895 and 1191 of Hill's Code of Oregon, has, by necessary implication, the further power to construe wills so far as they dispose of personalty, and, probably, also as to real property, though this is not so certain.

PROCEEDINGS TO SECURE CONSTRUCTION OF WILLS.—A probate court ought not to entertain a proceeding instituted merely for the purpose of having a judicial construction of a will; the interpretation of such an instrument should be only a step in the attainment of some other object. This rule is analogous to the well-established practice in equity: *Edgar v. Edgar*, 26 Or. 65, cited.

PROBATE OF WILL PARTIALLY VOID.—A will, appointing executors and directing the payment of funeral expenses and the expenses of administration, is entitled to probate, though its other provisions creating a charitable trust are invalid.

PROCEEDING TO REVOKE PROBATE OF WILL.—When the probate court has jurisdiction to direct and control the conduct and settle the accounts of executors, such as is conferred by section 895 of Hill's Code, a petition for the revocation of the probate of a will, instituted several years after the original probate, during which time the executor has been antagonistic to the interests of the petitioners, may be considered as a prayer for the direction of the executor in the administration of the personalty.

PUBLIC CHARITY—SCHOOLS.—A gift for the maintenance of free public schools is clearly a gift to a legal charity, and the object and the beneficiaries are as certain as the rules governing charitable trusts require: *Pennoyer v. Wadhams*, 20 Or. 274, cited and applied.

CHARITABLE TRUST FOR PUBLIC SCHOOLS.—The fact that by law provision has been made for the maintenance of public schools in all school districts, without making it, however, compulsory on the district to maintain such schools, does not render invalid a bequest in trust for the maintenance of a public school.

30	494
41	500
30	494
46	417
47	64

EQUITY JURISDICTION OVER TRUSTS.—Courts of equity in this country, except when prohibited by statute, exercise original inherent jurisdiction over charitable trusts: *Pennoyer v. Wadhams*, 20 Or. at page 279, cited and applied.

CHARITABLE TRUSTS—RULE AGAINST PERPETUITIES.—A charitable trust is not invalid, as against the rule of perpetuities, because the will provides for the appointment of trustees fifteen years after testator's death, the property in the meantime being given in trust to the executors, for the gift was absolutely and at once to charity, and falls under the exception to the rule.

GIFTS TO CHARITY—SUCCESSION OF TRUSTEES—EQUITY.—A charitable trust will not be permitted to fail because the trust may outlive the trustees who are appointed to administer it (*Brown v. Brown*, 7 Or. 285, cited); for charity is ever a favorite of equity, and a valid trust of that kind will not be suffered to lapse for mere want of a trustee. So, if a donation to charity is immediate and absolute, and a competent trustee is appointed to take, the other conditions being sufficient, a trust arises at once, the property becomes impressed with it, and immediately passes beyond the reach of the heirs or residuary legatees.

CHARITABLE TRUSTS—UNCERTAINTY OF TRUSTEES.—A charitable trust is not invalid on account of the uncertainty of the trustees, because fifteen years after testator's death, the property in the meantime being given in trust to the executors, the trustees are to be appointed, one each by the incumbent judges of the State Circuit Court and of the Federal District Court, and a third by the two so appointed, and vacancies to be filled by persons appointed by the incumbents of such judgeships.

JURISDICTION OF EQUITY TO APPOINT TRUSTEES.—A failure to act on the part of persons authorized to appoint the trustees of a charitable gift will not result in a failure of the trust, for equity will appoint and see that the wishes of the donor are carried out.

GIFT TO CHARITY A CHARGE ON LANDS DEVISED.—The fact that no provision was made in a will for the conveyance to the trustees of certain land therein given the executors in trust will not defeat the trust, as such land would be charged with the trust in either the hands of the executors or heirs.

ON MOTION TO CORRECT DECREE.

UNDERTAKING FOR COSTS ON APPEAL.—Under a bond "to pay all costs and disbursements that may be awarded against them on * * * appeal," given to perfect an appeal from an inferior court to the Circuit Court, the sureties are not liable for any expenses incurred by a further appeal to the Supreme Court.

From Multnomah: LOYAL B. STEARNS, Judge.

This is a proceeding by the heirs of James John, deceased, against Philip T. Smith, executor of the will of said John, involving the validity of certain charitable be-

quests contained in such will. The County Court, where the proceeding was commenced, sustained the will as it was written, and on appeal to the Circuit Court the decision was affirmed, from which the petitioners appeal.

AFFIRMED.

For appellants there was a brief over the names of *J. F. & E. B. Watson*, and *W. W. Thayer*, with an oral argument by *Messrs. Edward B. Watson, William W. Thayer*, and *Joseph N. Dolph*.

For respondents there was a brief over the names of *Catlin & Catlin*, *Edward N. Deady*, and *Nicholas & Davis*, with an oral argument by *Messrs. John Catlin* and *H. B. Nicholas*.

Opinion by MR. JUSTICE WOLVERTON.

This proceeding was instituted in the County Court of Multnomah County by the next of kin of James John, deceased, for the purpose of having revoked an order or decree of said court, made and entered July 29, 1886, admitting to probate in common form what purports to be his last will and testament. The following is a copy of the will, omitting formal parts and attestation:

"First—I do hereby give, bequeath, and devise all money, property, and estate, real and personal, of every kind and nature, of which I may die seized or possessed, or be entitled to at the time of my death, and wheresoever situate or being, to my executors hereinafter named, to and for the following uses and trusts, that is to say: (1) To sell and convert all my personal property into cash, at private or public sale, as to them shall seem best. (2) To lease all my real estate, except that certain block hereinafter mentioned, upon such terms and for such times and in such parcels as they may deem to the best interest of

my estate, but all leases shall terminate fifteen years after the date of my death. (3) After the payment of my funeral expenses, and the expenses of administration upon my estate, to expend all other moneys which shall come to their hands upon my death, from the sales of personal property, or from rents of real estate, in the erection of buildings for school purposes upon block No. 29, in the town of St. Johns, Multnomah County, State of Oregon, and employing teachers to teach the common school branches. (4) To sell all real estate fifteen years after the date of my death, and not before, excepting said block 29, and such other lots and blocks as they may deem necessary for school buildings and grounds, at public or private sale, with or without an order of court, and upon such terms as they may deem advisable, and the proceeds arising from such sales to be delivered to trustees to be appointed as hereinafter provided. If such sales shall not be for cash, then the notes and securities shall be turned over to such trustees. (5) It is my intention that all taxes, claims, charges, and expenses shall be paid out of money coming into the hands of my executors from other sources than from sales of real estate, and that only the remainder shall be used by them in erecting school buildings and supporting schools. (6) The sales of real estate hereinbefore mentioned to be made by my executors shall be made within eighteen years after my death, and not until fifteen years after my death. (7) It is my desire that my estate shall be used in establishing and maintaining free schools or school in the town of St. Johns; and that such schools shall be public, and at all times open to children of the school district, which shall embrace the town of St. Johns; and, if my executors shall consider it to the best interests of the children of said town and district, they may act in concert with the directors of said school district in erecting schoolhouses and

maintaining schools, but any and all buildings erected with money belonging to my estate shall belong to my estate, and not to the district, and all moneys expended in maintaining schools shall be expended under the supervision of my executors as long as they shall continue to act, and until the trustees hereinafter mentioned and provided for shall be appointed and qualify.

"Second—I do hereby nominate and appoint my friends, Philip T. Smith, of St. Johns, C. W. Burrage and P. A. Marquam, of Portland, executors of this my last will and testament, and in case either of them shall fail to accept the trust, I do hereby suggest my friend, John Catlin, to act as executor in the place of the one failing to accept.

"Third—It is my will that fifteen years after my death three trustees be appointed, as follows: One by the judge of the Circuit Court of the State of Oregon, in whose judicial district the town of St. Johns may be in; one by the person who shall be district judge of the United States in whose judicial district the town of St. Johns may be in; and the third shall be appointed by the two persons acting as such judges; and the three persons appointed as such trustees shall be and constitute a board of trustees, and such board shall have the possession, management, and control of all moneys and property by them received from my executors, for the purpose of promoting educational interests in the town of St. Johns, and to that end shall use such money and property so as to establish a permanent fund, the interest only to be used in educational purposes, or so much thereof as shall be necessary. The principal to be loaned only upon real estate security. A portion of the principal, which shall be in excess of fifty thousand dollars, in the discretion of such trustees, may be used in erecting buildings for educational purposes, and in employing teachers.

"Fourth—The persons acting as judges aforesaid, may from time to time make rules and regulations for the government of the board of trustees, which rules and regulations shall be binding upon such board, and they may fix the qualifications of such trustees, and determine whether or not they shall give security for the faithful performance of their trusts, and to whom such security shall be given.

"Fifth—It is not my intention to direct the particular branches of education which shall be taught, nor in any way limit the use of the money in promoting certain kinds of education, only I desire that it shall never be used to inculcate the doctrines of any religious sect or denomination, one more than the other.

"Sixth—It is my intention and desire to establish a permanent and perpetual educational fund, to be forever used in promoting education.

"Seventh—Whenever a vacancy shall occur in the board of trustees hereinbefore mentioned, such vacancy shall be filled by appointment to be made by the persons occupying the positions of judges as aforesaid. Said board to be always kept full, and to consist of three persons, a majority of whom may transact business."

The petition for the revocation of the order of probate is based upon two grounds: First, the want of testamentary capacity of the testator; and, second, the insufficiency of the attempted devise to charitable purposes, as it respects the objects and beneficiaries of the charity and the trustees in whom the power of administering the charity is reposed. The first ground of contest was abandoned at the trial, and the case is here for determination upon the latter ground only. It is contended by the executor that, the will having been properly executed, and provision made therein for the appointment of executors and the payment of debts, it was properly admitted to probate, and that this proceeding is without merit, even if

it be conceded that certain gifts or devises are void and of no effect for any purpose. It is said to be no objection to the probate of a will that some of its provisions are not valid or susceptible of being carried into effect: 3 Redfield on Wills and Executors, § 3, subd. 22; and *Baxter's Appeal*, 1 Brewster, 460. Again, it is considered to be well settled that a will, appointing an executor and making no disposition of personalty, is entitled to probate, whether it contains any disposition of real estate or not: 3 Redfield on Wills and Executors, § 4, subd. 15. By the older English books it was established that, if an instrument be testamentary, and is to operate upon personal property, probate must be obtained, whatever its form, but that a will which clearly respects lands ought not to be probated; while if the will was concerning both land and personal property probate was proper, though such probate was without prejudice to the heirs of the land: Schouler's Executors and Administrators, § 59. The ancient law proceeded upon the theory that there could be no proper testament without the naming of an executor, but modern jurisprudence stands in support of the will whether an executor is nominated therein or not, and yet the nomination of an executor is sufficient to make the instrument a will. It is not uncommon for a testator to make his will for the sole purpose of nominating an executor to administer his estate. A fundamental rule long established is that the personal property of a deceased person goes to his personal representatives, while the real estate goes to his heirs at law. At one time it was thought that realty could not be diverted from the channel of inheritance by devise, but that doctrine no longer prevails; so that a person may now dispose of his real as well as personal property at will. Under the old law, it was the province of ecclesiastical courts to assume jurisdiction touching the administration of the goods and chattels of deceased

persons, while the English chancery guarded with much jealousy its peculiar jurisdiction over the realty. But by statutory enactments in England, as well as in most of the United States, the discrimination between wills of real and personal property is abolished; their probate has become a necessary process to the establishment of title to either style of property, and is effectuated by the same method and in the same court: Schouler's Executors and Administrators, § 59. Accordingly, it has been held, under the statutes of this State, that the transfer of the title to the personal property of deceased persons is accomplished through the sole instrumentality of the court (*Winkle v. Winkle*, 8 Or. 193), and that a will must be admitted to probate before title to realty can be established under it: *Willamette Co. v. Gordon*, 6 Or. 175; and *Jones v. Dove*, 6 Or. 188. The will here assumes to dispose of both personal and real property.

The ordinary functions of a court of probate, acting upon a proceeding for the probate of a will, seems to determine two things only, viz.: the testamentary capacity of the testator, acting without restraint, and the sufficiency of the formalities observed in the execution of the instrument propounded as his last will and testament; in other words, whether the instrument propounded is the testator's spontaneous act expressing his last will in the form prescribed by law: Woerner's American Law of Administration, § 222; *Hegarty's Appeal*, 75 Pa. St. 516. Mr. Schouler says: "To construe a will duly probated, and define the rights of parties in interest, remains for other tribunals; they must interpret the charter by which the estate should be settled in case of controversy; while the probate court, by right purely of probate or ecclesiastical functions, establishes and confirms that charter": Schouler's Executors and Administrators, § 85; *Hawes v. Humphrey*, 9 Pick. 350 (20 Am. Dec. 481). No doubt exists

but that a will may be probated in part, but the question usually involved in such cases is whether any certain clause forms a part and parcel of the instrument, or was interpolated by a fraud upon the testator, or without his knowledge, after the will had been formally signed and attested: *Allen v. McPherson*, 1 H. of L. Cases, 191; *Harrison's Appeal from Probate*, 48 Conn. 202; *In re Welsh*, 1 Redfield Sur. 238; *Plume v. Beale*, 1 P. Wms. 388; *Morrell v. Morrell*, 7 Prob. Div. 68; and Schouler's Executors and Administrators, § 85. A distinction seems to have been taken between the testamentary incapacity arising from the person, and that which may arise from the nature of the subject-matter of the legacies or devises. The former is made to appear by evidence dehors the will, while the latter is apparent upon the face of the instrument itself; and where the record of the probate shows that the court has passed upon the question of fact touching the testator's personal capacity, its decree becomes conclusive of that question, but where the invalidity of the will, or some particular bequest or devise therein, is apparent from an inspection of the instrument, the matter is one of construction, and no action of a court of probate can change their effect: *Hegarty's Appeal*, 75 Pa. St. Rep. 516, and *Bent's Appeal from Probate*, 35 Conn. 523. These cases are pertinent in so far as they announce a rule applicable to the effect of the ordinary decree admitting a will to probate under the issues usually involved, that of testamentary capacity and the observation of due formality; but it does not follow that other matters may not be put in issue touching which the decree may not be conclusive. To illustrate: In *Dickinson v. Hayes*, 31 Conn. 417, a minor, between seventeen and twenty-one years, had made a will disposing of both real and personal property. Such a person could, by statute, dispose of personal property by will, but was incapacitated from so disposing of real estate. The decree of

probate was, in effect, that an instrument purporting to be her will "was presented in court for probate, and, having been duly proved, was approved, accepted, and ordered to be recorded." The question arose in that case, which was an action of ejectment, whether the decree was conclusive as to the testamentary capacity of the testatrix to devise real estate. The court held that it was not, because her capacity in that regard was not necessarily involved in the issue, nor was it necessary to infer that she had attained the age of twenty-one years at the time the will was executed, but that it was sufficient to uphold the order in general terms admitting the will to probate that she was above seventeen years of age, as the will was good in respect of the personalty. The inference is strong, however, that had there been an issue directly raised in the proceedings for the probate of the will as to testatrix's capacity to devise real property, it would have been decisive in the ejectment case. So we take it that issues within the jurisdiction of the court, other than those ordinarily involved in the probate of a will, may be tendered and heard at the same time, and, when heard and determined, will become conclusive, at least in so far as they affect the parties to the record or their privies.

But our probate courts are not entirely without authority or jurisdiction to construe wills, and more especially as it respects the disposition of personal property. By statute (Hill's Code, § 895, subds. 1, 2, 3, 4, and 5), the County Court is invested with exclusive jurisdiction, in the first instance, pertaining to a court of probate, in the following particulars: "1. To take proof of wills; 2. To grant and revoke letters testamentary of administration and of guardianship; 3. To direct and control the conduct and settle the accounts of executors, administrators, and guardians; 4. To direct the payment of debts and legacies, and the distribution of the estates of intestates;

and 5. To order the sale and disposal of the real and personal property of deceased persons." There is here involved, in the power to direct and control the conduct and settle the accounts of executors, and to direct the payment of debts and legacies, an implied jurisdiction to construe bequests, and thereby determine who shall take, for the very obvious reason that it is a necessary and unavoidable step in the direction of the distribution among legatees under a will. By section 1191 of our Code it is provided, in effect, that after the payment and satisfaction of all charges and claims against the estate, the court or judge thereof shall direct the payment of legacies and a distribution of the remaining proceeds of personal property among the heirs and other persons entitled thereto. Here is a positive enactment requiring the court or judge thereof to direct the payment of legacies, but before it can exercise that power it must determine who the legatees are, and the nature and amount of their respective shares, and this it must do by an inspection of the will and a consideration of the bequests. In short, it must construe the will in order to intelligently comply with these requirements. Under a similar statute, in Michigan and other states, it has been held that the probate court has jurisdiction to construe wills, such power being necessarily involved in the power to assign the estate of the testator on the settlement of the executor's account: *Glover v. Reid*, 80 Mich. 228 (45 N. W. 91); *Byrne v. Hume*, 84 Mich. 185 (47 N. W. 679), S. C. 86 Mich. 546 (49 N. W. 576); *In re Verplanck*, 27 Hun. 609; *Siddall v. Harrison*, 73 Cal. 560 (15 Pac. 130); *In re Hinckley's Estate*, 58 Cal. 518; *Hill v. Bloom*, 41 N. J. E. 276 (7 Atl. 438). The jurisdiction of the County Court to construe a will as it pertains to real property is not so apparent. Such property descends to the heirs, subject to the debts of decedent, and yet it would seem that, if there be any surplus of the proceeds of

the sale of real property sold for the payment of debts and legacies, the court must direct the distribution thereof (Hill's Code, § 1192); and in this particular, and possibly in others, such as upon application for an order to sell and an order to confirm a sale under a power, its jurisdiction would extend to the construction of such a will, because it is a necessary yet incidental step in considering the application. So it may be considered that the County Court, in the transaction of probate business, has jurisdiction for the construction of wills, as it respects bequests, and possibly, in special cases, as to devises.

There is a rule of equity which inhibits the assumption of equitable jurisdiction for the sole purpose of construing a will, and the jurisdiction will not be exercised unless there exists some special reason for seeking its interposition other than a mere desire to obtain the opinion of the court touching the proper interpretation of such an instrument: *Edgar v. Edgar*, 26 Or. 65 (37 Pac. 73); *Siddall v. Harrison*, 73 Cal. 560 (15 Pac. 130); and *Crosby v. Mason*, 32 Conn. 482. "The reason," as stated by LORD, C. J., in *Edgar v. Edgar*, "is that the decision of such questions is purely legal, and equity will not assume jurisdiction to declare legal titles, unless it has acquired jurisdiction of the case for some other purpose." See *Bowers v. Smith*, 10 Paige, Ch. 193. Probate jurisdiction being in its nature equitable, by analogy of this rule the probate court should not entertain a proceeding instituted for the mere purpose of obtaining the opinion of the court touching the construction of a will, even in those matters where in it has jurisdiction to interpret. There should be some special purpose to be attained, and the interpretation should come as a means of granting the relief sought. Such questions ought to find solution only as they are involved in litigation touching actual dispute, as it is difficult and often impossible to construe any instrument gen-

thereof? We believe we are justified in so considering it, in view of the fact that the court has the authority "to direct and control the conduct and settle the accounts of executors," and that such proceeding was not instituted until more than five years after the original probate of the will in common form, during which time the executor has presumably been proceeding in a manner antagonistic to the alleged interests of the objectors. So that it is with some hesitancy we proceed to construe the will as it affects the personal property and the executor's duties respecting it, and, however it may incidentally affect the disposition of the real property, we disclaim any attempt to adjudicate touching its construction as it pertains to that particular class of property.

The purpose of the testator was to establish and maintain a school or schools within the town of St. Johns, which should be free and public, and at all times open to the children of the school district which shall embrace such town. That a bounty in support of such a school or schools would be a public charity needs no argument or authority to demonstrate or establish. It comes within the letter and spirit of all definitions of a legal charity: *Pennoyer v. Wadhams*, 20 Or. 274 (11 L. R. A. 210, 25 Pac. 720). The object is definite, and the beneficiaries as certain as the rules governing charitable trusts require.

Nor is it any the less a charity because, as contended by counsel, the State has for all practical purposes provided for the maintenance of free public schools for all children of school age within the same territory: *Green v. Blackwell*, 35 Atl. 375. The bounty of the State for the support and maintenance of common schools is a creature of governmental policy, and subject to the will of the people. They may change, modify, or even abrogate the policy, subject to the provisions of the fundamental law respecting it, and the constitution itself may in time be

superseded by another. The framers of the constitution have wisely provided for the accumulation of an irreducible common school fund from the proceeds of lands granted to the State for educational purposes, from the proceeds of escheats and forfeitures, and gifts, devises, and bequests made to the State for common school purposes, and other sources, the interest arising from the investment of which is exclusively applied to the maintenance of common schools. The revenues arising from this source are as yet insufficient for the support and maintenance of free schools throughout the State during the entire school year. For the purpose of supplementing this fund, the legislature has provided for the levy of a four-mill tax in each county (Hill's Code, § 2785). Beyond this, individual school districts may supplement the fund so as to make the schools absolutely free to the children of school age within such districts. So it may be said that ample provision is made by law for the support and maintenance of free schools in all the districts within the State. But, with all this, it is not compulsory with any district to levy a tax for the support of free schools within its territory, and it may, by neglect to have a school taught for one quarter in each year, forfeit all right for the time being to the school funds derived from whatsoever source. So that it may be readily seen that even the system provided by the State, while worthy of commendation, and free schools may be maintained under it in all the districts, does not guarantee that such schools shall be so maintained, and there is no absolute assurance under the law that a free school will be maintained within the district embracing the town of St. Johns. Hence, there are, in fact, no conditions provided for by the State which will assuredly and inevitably meet the purposes of the testator. If the time should come when, by reason of the State's regulation of the public school system, the object of the bounty should

substantially fail, then another question would arise, involving, perhaps, the cy pres doctrine; but, suffice it to say, that at this time the object of the testator's charity is not essentially supplied or superseded.

We come, now, to a construction of the will for the purpose of ascertaining the effect of its provisions touching the disposition of the personal property of the testator. As we have seen, the bequest was for a charitable purpose, but the question with which we have to deal is whether the method which was adopted by the testator is sufficient in law to effectuate the purpose. The bequest is direct to executors named, to and for certain uses and trusts, viz.: To convert into cash; to lease the real property for fifteen years; to expend all moneys which shall come into their hands, together with the proceeds of sales of personal property and rents of real estate, after payment of taxes and charges of administration, in the erection of buildings for school purposes upon block 29; to sell all real estate, except block 29, and such other lots and blocks as they may deem necessary for school buildings and grounds, between fifteen and eighteen years after the testator's death; and to deliver the proceeds, whether in cash or notes with sureties, to other trustees, to be appointed fifteen years after the testator's death, in manner following: One by the judge of the Circuit Court of the State of Oregon in whose judicial district the town of St. Johns may be, one by the person who shall be district judge of the United States in whose judicial district the town of St. Johns may be, and a third by the two persons acting as such judges; such persons so appointed shall constitute a board of trustees who shall have the possession, management and control of all moneys and property by them received from the executors. The persons acting as judges aforesaid may from time to time make rules and regulations for the government of the board which shall

be binding upon them, and they may also fix the qualifications of the trustees, and determine whether and to whom they shall give security for the faithful performance of their trust. It is further provided that whenever a vacancy shall occur in such board of trustees it shall be filled by appointment to be made by the persons occupying the positions of judges aforesaid; such board to be always kept full, and to consist of three persons, a majority of whom may transact business. It is a familiar doctrine, which holds good in moral ethics as well as in legal policy, that the will of the testator should, when ascertained, be upheld and given effect whenever it is possible, having regard for fixed rules of law, long established, of which every person is bound to take cognizance. The discussion goes somewhat to the powers of a court of equity as the jurisdiction is exercised in this State, the real question being whether or not the executors—and, succeeding them the board of trustees, the appointment and perpetuation of which as a board is provided for by the testament—are competent trustees to administer the charity. In other words, does the will appoint and provide for the naming of such trustees as are competent to take hold of and administer the charity in the manner directed? And, if not, should a court of equity provide trustees, and entrust them with the administration of it? In *Trustees of M. E. Church v. Adams*, 4 Or. 77, it is held that "Equity jurisdiction, as administered by the courts of this State, derives its authority from the constitution and laws of Oregon, and includes only the ordinary jurisdiction of the court of chancery of England, modified and extended by the statutes of this State, and the changes in the condition of affairs of the community." In the latter case (*Pennoyer v. Wadhams*, 20 Or. 274, 11 L. R. A. 210, 25 Pac. 720), Mr. Justice BEAN, after discussing the question whether or not the peculiar equitable jurisdiction over charities, as distinguished from the juris-

diction touching ordinary trusts, was derived solely from the statute of 43 Elizabeth, chapter 4, says: "It may then be stated, as a proposition supported by the great weight of authority in this country, that courts of equity in the various states, where they are not prohibited by statute, exercise an original inherent jurisdiction over charitable trusts, and apply to them the rules of equity, together with such other rules as may be applicable under the laws of the several states; and this they do by virtue of their inherent powers, without reference to whether the statute of Elizabeth has been adopted in this State." These authorities render it unnecessary to enter into a discussion of the once-disputed question touching the origin of equitable jurisdiction as it respects the peculiar doctrine governing charitable trusts.

It is contended by the objectors to the will that the property has not been given to a person sufficiently certain having capacity to execute the trust imposed. It is somewhat difficult to determine from the books what is required in this respect. The bequest is directly to the executors named, and thus far there is undoubtedly sufficient certainty as it regards the appointment of trustees. It is admitted by appellants that if this were all the will contained it would be sufficient in that respect. But it is urged that there is a scheme connected with the execution of the trust whereby the testator has attempted to create a trustee, an entity, and to devise the manner of its perpetuation, all which is unknown to the law; that the entity is not a person, either real or artificial, and that the mode of its perpetuation is a thing which the law does not recognize; and that, taken as a whole, he has failed in his appointment of a trustee sufficiently certain and capable of recognition with capacity to execute the trust. It is said that the rule against perpetuities has no application to charitable trusts. It is, indeed, a striking charac-

teristic of such trusts that they continue forever. They are not, however, exempt from the rule, barring one very important exception. The word "perpetuity" has a technical signification, denoting the period of time beyond which a future interest cannot vest: 18 Am. & Eng. Enc. Law (1st Ed.), 362. "It may," says Mr. Sanders, "be defined to be a future limitation, restraining the owner of the estate from aliening the fee of the property, discharged of such future use or estate, before the event is determined or the period arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law it is not a perpetuity": Sanders' Essay upon Uses and Trusts, 196, cited in *Perin v. Carey*, 65 U. S. (24 How.) 494. If a gift be to charity, then over to an individual, or to an individual, then over to charity, the rule is effective, and has perfect application. But a gift to charity, then over to charity, forms the exception, and this is sustained upon the reasoning that, as one charitable use may be made perpetual, speaking in a general and natural sense, the gift to two in succession can be of no longer duration or of greater evil. The property is taken out of commerce, and goes instantly into perpetual servitude to charity. While the form of charity may vary, and a succeeding form become effective, contrary to the rule, the primary object, that of charity, continues and is allowable, through the law's regard for charitable uses, and in consideration of the beneficial results flowing therefrom: *Storrs' Agricultural School v. Whitney*, 54 Conn. 342 (8 Atl. 141). The exception has even a broader significance. A gift may be made in trust for a charity not in esse, but to come into being at a time uncertain in the future, or which is to take effect upon some contingency that may possibly not happen within a life or lives in being and twenty-one years and nine months afterwards, and it does not contravene the rule, provided there is no gift in the meanwhile

to or for the benefit of any private corporation or person. The doctrine finds support upon the ground that the intention in favor of charity is absolute, the gift and the constitution of the trust is immediate, takes effect in presenti, and the only thing which is postponed or made dependent for its execution upon future and uncertain events is the particular form or mode which the donor would have applied to the execution of the charity.

In *Chamberlayne v. Brockett*, 8 Ch. App. 206, a testatrix bequeathed her estate, consisting entirely of personalty, to trustees, upon trust to invest it in consols, and to make out of the dividends certain fixed annual payments for charitable purposes. Among other things, she directed that when and as soon as land should at any time be given for the purpose as thereafter mentioned, almshouses should be built in three specified places, and that the surplus remaining after their completion should be appropriated in the way of allowances to the inmates. The bequest was held valid as an absolute immediate gift to charity, the mode of execution only being made dependent upon future events. In *Henshaw v. Atkinson*, 3 Madd. 306, money was bequeathed to erect a blue-coat school and an asylum for the blind, with directions that lands should not be purchased, but with the expression of an expectation that lands would be given for the charities. It was argued that the bequest could not operate because, as it was said, it was the testator's intention that the charities were not to take effect until lands were supplied by others, and the money might be locked up for an indefinite length of time; but the court was of opinion that the point was not well taken, in view of the rulings in *Attorney General v. Lady Downing*, Amb. 550; and *Attorney General v. Bishop of Chester*, 1 Brown Ch. 389. The state of facts in the Downing College case was that a testator devised lands to trustees, with directions to purchase with the rents and profits

grounds at Cambridge proper for a college, and to build such structures as should be deemed necessary for the purpose, and to obtain a royal charter for founding such college, and incorporating it by the name of "Downing College" in the University of Cambridge; the trustees to hold the property devised "in trust for the said collegiate body and their successors forever." It was objected that the devise was void, for that there was no cestui que trust in being, and perhaps never might be, for it was at the will and pleasure of the crown to grant the charity or not; but the devise was held valid against the objection: *Attorney General v. Lady Downing*, Amb. 550. In the Bishop of Chester case, it appears that Archbishop Secker gave £1,000 to trustees for the establishment of a bishop in the British possessions in America. Lord Chancellor THURLOW ruled that "the money must remain in court until it shall be seen whether any such appointment shall take place," against the objection of Mr. Mansfield that there was neither a bishop in America nor the least likelihood of there ever being one, for which reason it was claimed the legacy was void: *Attorney General v. Bishop of Chester*, 1 Brown's Ch. 389. In *Sinnett v. Herbert*, 7 Ch. App. 232, the testatrix bequeathed the residue of her personal estate to trustees, upon trust to be applied in the erection or endowing of an additional church at Aberystwith. A question was made as to a possible difficulty touching the time when her intentions could be carried into effect, and it was held that the possible remoteness did not render the gift void. In *Inglis v. Sailors' Snug Harbour*, 28 U. S. (3 Pet.) 99, the testator gave an estate, consisting of both real and personal property, to the chancellor of the State of New York, the recorder of the City of New York, and others (naming them in their official capacity), to have and to hold unto themselves and their respective successors in office, but for certain uses and purposes, viz.: to erect an

asylum or marine hospital to be called the "Sailors' Snug Harbour." He evidently intended that the institution thus created should be perpetual, and that the officers named and their successors should forever continue to be the governors thereof, but directed that if such a thing could not be legally done, according to his desires, without an act of the legislature, then that they (the trustees) procure an incorporation to be had for the purposes specified. It was held that the officers named took, not in their official but in their individual capacity, and that the official distinction was a mere *designatio personae*. But the case was treated as though no particular estate had been provided for, and the disposition under the will was held to be an executory devise. The gift was declared to be valid, and it was said that upon the creation of the corporation the title to the property became vested in it, or that the naked title was held by the heir at law in trust for the corporation.

In a later case in the same court (*Ould v. Washington Hospital*, 95 U. S. 303), it appears that a devise of certain lots was to two persons "and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor," but in trust to hold the same "as and for a site for the erection of a hospital for foundlings, to be built and erected by any association, society, or institution that may hereafter be incorporated by an act of congress as and for such hospital, and, upon such incorporation, upon further trust to grant and convey the said lots of ground and trust estate to the corporation or institution so incorporated, * * * which conveyance shall be absolute and in fee." The corporation was to meet the approval of the trustees, but, if not so approved, then they were to hold upon the further trust until such a corporation as they would approve was created by act of congress. The possible remoteness of the incorporation of such a society by

congress as would meet the approval of the trustees was held to be no objection to the establishment of the trust. An obvious analogy was observed between that and the Sailors' Snug Harbour case. Mr. Justice SWAYNE says: "There, as here, a future corporation was necessary to give the devise effect. There, as here, there was a possibility that such a corporation might never be created. In both cases the corporation was created, and the intention of the testator carried into full effect. It is a cardinal rule in the law of wills that courts shall do this whenever it can be done. Here we find no impediment in the way. The gift was immediate and absolute, and it is clear beyond doubt that the testator meant that no part of the property so given should ever go to his heirs at law, or be applied to any other object than that to which he had devoted it by the devise here in question." But without going further into authorities, we cite in support of the proposition, *McDonogh's Executors v. Murdoch*, 65 U. S. (15 How.) 367; *Sanderson v. White*, 18 Pick. 328 (29 Am. Dec. 591); *Russell v. Allen*, 107 U. S. 163 (2 Sup. Ct. 327); *McIntire Poor School v. Zanesville Canal Co.*, 9 Ohio, 203 (34 Am. Dec. 436); *Miller v. Chittenden*, 2 Iowa, 315; S. C. 4 Iowa, 252; *Odell v. Odell*, 10 Allen, 1; *Jones v. Habersham*, 107 U. S. 174 (2 Sup. Ct. 336); 2 Perry on Trusts, § 736; *Christ's Hospital v. Grainger*, 16 Sim. 83; 1 Jarman on Wills, *262, note; *Crerar v. Williams*, 145 Ill. 625 (34 N. E. 467, 21 L. R. A. 454); *Webster v. Morris*, 66 Wis. 366 (57 Am. Rep. 278, 28 N. W. 353). These cases involve, indiscriminately, bequests and devises, showing that the rule is not different whether real or personal property is the subject of the testator's bounty. See in this connection 2 Washburn on Real Property, *375, subd. 6. In the Chamberlayne case, as well as some others, the point was made that if the gift had been to take effect upon a remote contingency, the rule against perpetuities would have been as applicable as

to any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, or if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails ab initio; but "when," says Lord Chancellor SELBORNE, "personal estate is once effectually given to charity, it is taken entirely out of the scope of the law of remoteness." The question here determined was not combatted with great confidence by appellants at the argument, but we have gone into the consideration of it thus at length, and for this we may be pardoned, because it is deemed to have a special bearing upon the cardinal question.

We will now consider the nature and capacity of the trustee which the testator has attempted to create and clothe with perpetuity or longevity co-equal in point of existence with the charity he has endeavored to establish. We can best reach a satisfactory result by a review of the authorities, and then apply the deductions to the facts of the case. There is a class of cases of which *Inglis v. Sailors' Snug Harbour* is perhaps the leading one, the facts for an understanding of which have been heretofore sufficiently stated. It seems to have been intimated by the justice who wrote the prevailing opinion that if the devise had been to the officers named in the will in their official capacity, and their successors, to execute the trust, without the contingent provision for the creation of the incorporation, the case would have fallen within the principle of *Philadelphia Baptist Association v. Hart's Executors*, 17 U. S. (4 Wheat.) 1. Whether this was a method of passing the point simply, and resting the case upon a more satisfactory basis, or whether the Baptist Association case was taken as decisive of the question, it is difficult to tell from the opinion. At any rate, it was finally determined that the will could be sustained as an executory devise to a

corporation to be created in the future, the devise to take effect upon the contingency of the creation of the corporation, and that the contingency was not too remote. Mr. Justice STORY was of the opinion that the officers named took in their official capacity, and that the devolution of the property was to their successors, and so on in perpetual succession, and that it was perfectly competent for them to take and hold as trustees in such a capacity. In this connection it may be said that the Baptist Association case involved a devise to a voluntary unincorporated association, to take in trust and manage as a perpetual fund, and it was held, Chief Justice MARSHALL announcing the opinion of the court, that the devise did not create a valid trust to charity, upon the ground that the association was incapable of taking. It was further decided that the devise was not to the individuals composing the association, as nothing was intended to pass to them but the trust, and they were not authorized to execute as individuals. It was thought also that a subsequent incorporation of the society would not cure the defect. *Ould v. Washington Hospital* is so nearly like the Sailors' Snug Harbour case that Mr. Justice SWAYNE remarked the analogy between the two. It being held that the officers in the Snug Harbour case took as individuals, it would seem that the analogy was perfect as it respects the preliminary provisions for the trust. In the Washington Hospital case the devise was to individuals and their heirs, executors, assigns, etc. Although the Snug Harbour case was treated as if the devise to the officers named was not contained in the testament, and the will was sustained as an executory devise to a corporation to come into being, without a particular estate to support it, it is not clear why it should not have been upheld as an executory devise as well, under the rule that the deviser had parted with his whole estate to the officers named, they taking as indi-

viduals, but upon a contingency that qualified the disposition of it, and limited the estate upon that contingency (4 Kent's Commentaries, *268); or, perhaps, speaking more accurately, why it might not have been treated as a conditional limitation of the estate vested in the trustees, as Mr. Justice SWAYNE characterized the Washington Hospital case. In the latter case the gift was declared to have been immediate and absolute; and if such was the case there, it is difficult to see why it was not so in *Inglis v. Sailors' Snug Harbour*, upon the theory that the officers took as individuals. If the doctrine in the Washington Hospital case is right, and it is believed to be the better exposition, then the gift to charity in either case did not depend for its validity or establishment upon the contingency of the creation of the corporation provided for, and hence was immediate and absolute. In *Russell v. Allen*, 107 U. S. 163 (2 Sup. Ct. 327), lands and personalty were granted "for the purpose of founding an institution for the education of youth in St. Louis, Missouri," to one Horner and his successors, in trust, "for the use and benefit of the Russell Institute of St. Louis, Missouri," with directions to the grantee to sell them, and to account for and pay over the proceeds "to Thomas Allen, president of the board of trustees of the said Russell Institute," and it was held that the gift was valid as a charity, against the donor's heirs and next of kin, although the institute was neither established nor incorporated in the lifetime of the donor or of Allen, the reputed president of the board of trustees. In conformity with the trust, Horner paid and conveyed to Allen a large amount of money and lands, and the money and lands in the hands of Allen and his executors were considered to have been charged with the same charitable trust to which they were subject in the hands of Horner: See also *Trustees of Cory Universalist Society v. Beatty*, 28 N. J. Eq. 570; *Crerar v. Williams*, 145 Ill. 6; et-

(21 L. R. A. 454, 34 N. E. 467); *Coit v. Comstock*, 51 Conn. 352.

Another class of cases, of which *Vidal v. Girard's Ex.*, 43 U. S. (2 How.) 126, is the leading authority, establishes the doctrine that where a municipal corporation has capacity under its charter to take and hold such property as is made the subject of the trust, it may take and hold the same upon trust in the same manner and to the same extent as a private person may do. However, if the trust be repugnant to or inconsistent with the proper purposes for which the corporation was created, it would not be compelled to execute it; but this condition will furnish no ground to declare the trust itself void, if otherwise unexceptionable. In such case, the trust having fastened itself upon the property, a court of equity will appoint a new trustee to enforce it: See also *Perin v. Cary*, 65 U. S. (24 How.) 494; *McDonogh's Executors v. Murdoch*, 56 U. S. (15 How.) 367; *Chambers v. City of St. Louis*, 29 Mo. 543; *Board of Commissioners of Rush Co. v. Dinwiddie*, 139 Ind. 128 (37 N. E. 795); *Skinner v. Harrison Township*, 116 Ind. 139 (2 L. R. A. 137, 13 N. E. 529); *Dailey v. City of New Haven*, 60 Conn. 314 (14 L. R. A. 69, 22 Atl. 945).

There is another class of cases of which the *Baptist Association v. Hart's Executors*, 17 U. S. (4 Wheat.) 1, is a type, among which the views expressed are not uniform. This class involves bequests or devises to voluntary unincorporated societies. As we have seen, it was held in the Baptist Association case that such a devise was void for want of capacity to take as a trustee. The holding has not escaped criticism in later adjudications, and it may be said to be distinguishable by the fact that the supposed trust arose under the laws of Virginia, which, as measured by the adjudications there, recognize no distinction between charitable and other trusts: *Russell v. Allen*, 107 U. S. 163 (2 Sup. Ct. 327); *Kain v. Gibbonev*, 101 U. S. 362;

and *Jackson v. Phillips*, 14 Allen, 588. In *Magill v. Brown*, Brightley N. P. 347, 348, a case in the Circuit Court of the United States for the eastern district of Pennsylvania, Mr. Justice BALDWIN, with whom Judge HOPKINSON, the district judge, concurred, held that devises to the Monthly and Yearly Meetings of Friends in Philadelphia, voluntary unincorporated religious societies, as trustees to administer charity, were operative and valid. SHARSWOOD, J., in *Zeisweiss v. James*, 63 Pa. St. 465, 3 Am. Rep. 558, says: "No doubt an unincorporated society may be a trustee, invested with such a discretion (to appoint the charity), and may perpetuate itself by the succession of its members," citing in support thereof *Magill v. Brown*; *Domestic and Foreign Missionary Society's Appeal*, 30 Pa. St. 425; and *Evangelical Association's Appeal*, 35 Pa. St. 316. It will be noted that these are cases arising in Pennsylvania, and that the peculiar religious associations known as the "Monthly and Yearly Meetings of Friends" are considered as a body politic or corporate by prescription, possessing and enjoying the franchise of succession, with the same rights of property, as natural persons do by inheritance: *Magill v. Brown*, Bright, 347, 348. In *Bartlett v. Nyc*, 4 Met. (Mass.) 378, a devise of real estate to an unincorporated society for charitable uses was considered to be valid; but it was held that in such case the estate descended to the heirs of the testator subject to the trust created by the testament, which they were bound to execute, and that a court of equity will enforce the observance and due execution upon their part. This is in accord with the idea that the trust has become fastened to the property, and that the court will compel its observance in whatsoever hands it may come. The same rule was applied to a bequest of personal estate, in the hands of executors: *Burbank v. Whitney*, 24 Pick. 146 (35 Am. Dec. 312). The rule is the same in Connecticut, *Am. Bible Society v. Wet-*

more, 17 Conn. 181; and in Iowa, *Byers v. McCartney*, 62 Iowa, 339. See also *Bliss v. Am. Bible Society*, 2 Allen, 334.

We come now to a class of cases wherein the testator has appointed trustees and has attempted to devise the manner of their perpetuation as a board. In *Treat's Appeal from Probate*, 30 Conn. 113, the bequest was to sundry persons named, and to their successors forever, "who shall as a board of trustees add to and perpetuate their number, so long as in their opinion the objects of this bequest shall require the existence of the same." It was argued that the trustees were not a body corporate, and, having no legal successors, except so far as they might be appointed from time to time by themselves, the trust might fail for want of persons to uphold the title. The court held to the contrary upon the authority of the *American Bible Society v. Wetmore*, 17 Conn. 181, which was a devise to an unincorporated religious society, saying "a trust never fails for the want of a trustee." It appears to have been assumed that so long as the board was kept full by the appointment of their successors, no question could arise respecting their power and authority to administer the charity. Somewhat analogous to the case is *Heuser v. Harris*, 42 Ill. 425. A devise was made of lands to be sold, one-half the proceeds to go to a certain school district, and to be used for school purposes only, to be under the control of a trustee to be elected by the "people" for a term of four years. It was held that the school district had the capacity to take, and that in case the people should fail to elect a trustee, chancery would supply one, and the trust would not fail for the want of one. *Seda v. Huble*, 75 Iowa, 429, 9 Am. St. Rep. 495, is a case where a bequest was made to two persons, naming them, with directions that they and their successors should invest the fund for the benefit of a church. The trustees named were presumably some officers of an unincorporated voluntary society. The

bequest was sustained as being to the parties and not to the church, and the doctrine reiterated that a trust would not be permitted to fail through the failure of a trustee. In *Estate of Hinckley*, 58 Cal. 457, provision was made in the will for filling vacancies in the board of trustees by "an election, duly notified, in which election each of the trustees of said religious society (First Unitarian Society of San Francisco) and each of the trustees of this fund shall be entitled to one vote," and no question was made touching the capacity of the board to administer the charity, which was to constitute a perpetual fund to be called "The William and Alice Hinckley Fund." It so happens, at times, that individuals are appointed to administer a charity without any provision for perpetual succession, and yet the donation is not allowed to fail by reason of the fact that the charity will outlive the trustee: *Brown v. Brown*, 7 Or. 285, was a devise to individuals as trustees, to hold in perpetuity, which it was held constituted a donation to charity, and yet the devise was sustained without any provision for perpetual succession of trustees to administer the trust.

There are yet other cases which go further toward supporting, upholding, and maintaining the charity than any of these. In *Hunt v. Fowler*, 121 Ill. 269 (12 N. E. 331), the testatrix's codicil contained this clause: "All the rest and residue of my estate, including that which may lapse from any cause, I direct to be invested or loaned upon the best terms possible, so as to produce the largest income, and said income to be distributed annually among the worthy poor of the City of La Salle, in such manner as the court of chancery may direct." No trustee was appointed, but, as the distribution of the fund was expressly referred to a court of chancery, and it was held that the power of distribution carried with it the power to select the individuals to whom the distribution should be made,

a trustee was appointed by the court in effect to be a trustee of the testatrix's appointment. In *Witman v. Lex*, 17 Sug. & R. 88 (17 Am. Dec. 644), the court say: "It is immaterial whether the person to take be in esse or not, or whether the legatee were at the time of the bequest a corporation capable of taking or not, or how uncertain the objects may be, provided there be a discretionary power vested anywhere over the application of the testator's bounty to those objects." This doctrine is reiterated with approval in *Vidal v. Girard's Executors*, 43 U. S. 126. And such bequests as "to the poor of Madison County," and to the "suffering poor of the town of Auburn," without any appointment of trustees to administer the trust, have been held to be a sufficient donation to charity, and that the court would appoint trustees to execute the trust: *Heuser v. Harris*, 42 Ill. 425; and *Howard v. American Peace Society*, 49 Me. 288. These cases, however, seem to have been decided upon authorities which would indicate that there had not been a due discrimination between the ministerial function of the English chancery, employed to administer the arbitrary power of the king as *parens patriae*, and that which was exercised in a purely judicial capacity. However, a bequest "to the Sunday School of the Methodist Episcopal Church at Tuckerton" has been maintained, and the church to which the Sunday School was an adjunct, being a corporation, was appointed a trustee in equity, and that without reference to the English authorities: See *Mason's Executors v. Trustees of M. E. Church*, 27 N. J. Eq. 47. These latter cases carry the doctrine to the very verge. The following principles are settled in Tennessee: "First, that trusts for charitable uses should be favored by courts of equity; second, that where the object of charity is definite, and it is to be administered by trustees, it will be sustained; third, that, although the objects may be too indefinite for a court of

chancery to undertake to administer it, yet if a trustee capable of taking the trust be named, and clothed with the necessary powers and discretion for carrying out the charity, it will be upheld": *Heiskill v. Chickasaw Lodge*, 87 Tenn. 668 (4 L. R. A. 699, 11 S. W. 825).

The citation of these authorities from those states, such as Oregon, which recognize the distinction between charitable and ordinary trusts, is sufficient to demonstrate beyond cavil that it is the policy of the law to uphold and give effect to donations to charity whenever it can be done under any reasonable construction of the instrument by which the charity is attempted to be established. Charity is still, as under the English chancery practice, a favorite of equity, and, while in this country there has been much modification of the rules governing charitable donations, and perhaps a radical narrowing of the jurisdiction (see 2 Perry on Trusts, §§ 729, 731), the conscience of the court is always exercised to see that the charity is administered, if it can be done within the rules of the established law of the forum. The general rule everywhere is, whether speaking with reference to ordinary or charitable trusts, that a valid trust will never be permitted to fail for want of a trustee. This, of course, implies the existence, in the first instance, of a valid trust. But where there is an appointment of a trustee competent to take, and the other conditions of the trust are commensurate to give it validity, there can be no doubt that the property itself becomes impressed with the trust, and a subsequent failure of a trustee will not relieve it of this condition. So, if a donation to charity is immediate and absolute, and a trustee is appointed competent to take, the other conditions being sufficient, a trust arises at once, the property becomes impressed with it, and passes beyond the reach of the heirs or residuary legatees or devisees. The title is effectually diverted from its natural channel of devolution,

in so far as it may be affected by reason of the necessity of a competent trustee as an ingredient to a valid trust.

Now, to the purposes of this case: The executors appointed are trustees charged with the duty of executing in part the scheme adopted by the testator for the administration of the charity intended to be established. After the administration of the estate, they are to use the remainder of the money coming into their hands at the death of the testator, together with the rents of the real property, which they are charged with leasing, in the erection of buildings for school purposes, on block 29, loaning the funds, etc. A direct and explicit execution of the trust is given into their charge—not to carry out the scheme in its utmost detail, but to carry it forward for the space of some eighteen years, until it should go into the hands of other trustees, designed to be a permanent board for the perpetual administration of the trust. Now, can there be any question but what there was here an immediate and absolute donation to charity, with the appointment of trustees perfectly competent to take? Certainly not. The estate passed from the testator to the trustees direct. It never vested in the heirs, and the trust does not depend for its validity or establishment upon the performance of any condition or the happening of any event. The donation was in praesenti, and the estate vested at once in the trustees. The trust became fastened upon the property when the will took effect. But it is claimed that the scheme for administering the trust is impracticable, as the board of trustees which it was intended should succeed to the trust may never be established, inasmuch as the judges named are not compellable to appoint the members thereof, and even if appointed they would not constitute such a body known to law as having perpetual succession, and therefore could not administer the charity. We quite agree with the coun-

sel that the judges may create the board or not as they see fit. It was designed that the judges in office for the time being should exercise the power of appointment, but in doing so they would not be acting in the exercise of their judicial functions, as it is no part of the duties enjoined upon them by law. They must, therefore, act, if at all, in an individual capacity. Should they appoint, the board would be an aggregation of individuals, not a single entity capable of acting as an official body, and we see no reason why the board may not be kept full and maintained perpetually by the judges named, and be perfectly competent as individuals to execute the duties required of them. It will be borne in mind that the judges are authorized and empowered to appoint the trustees, not to use a discretion to name and appoint the objects of the charity or to create a definite charity. They are invested with no discretion or power whatever as it respects this feature of the trust. They take no property interest in any capacity, either as individuals, trustees, or otherwise, nor are they empowered to devise a scheme for the administration of the charity. The testator has not only appointed his own scheme of charity, to wit: the establishment of a free school or schools for the children of the district embracing the town of St. Johns, but he had prescribed with some particularity and detail a scheme or plan of administering the charity thus appointed. There is manifestly a distinction between the scheme of charity and a scheme for administering it: See *Webster v. Morris*, 66 Wis. 396, 397 (57 Am. Rep. 278, 28 N. W. 353). The power given the judges to formulate rules for the government of the board may enable them to direct in some measure the particular manner of carrying out the scheme for its administration, but it can in no way impinge upon, change, or modify the nature of the charity which the testator has sought to establish, nor can they in any way modify the

manner of administration wherein the testator has particularized; and it is believed that this clause of the will can hardly be construed as giving the judges supervisory control over the board of trustees in the direction of the trust.

To reinforce the point, we cite by way of illustration *Fontain v. Ravenel*, 58 U. S. (17 How.) 369. There "the executors, or the survivors of them, after the decease of testator's wife, were to dispose of the property for the use of such charitable institutions in Pennsylvania and South Carolina as they or he may deem most beneficial to mankind." The executors died before the testator's wife. It was held that, the testator having delegated this power of appointing the particular charity to the executors, and the conditions upon which they were authorized to exercise their discretion having failed, the court was without jurisdiction to appoint others to exercise a discretion which was personal to those named by the testator. The question there involved a selection of the objects of charity, which the testator had failed to do; here it involves the manner of its execution, with the object definitely designated and pointed out. The failure of the judges designated to exercise the power delegated to them would simply result in a failure of trustees, in which event a court of equity would certainly not allow the trust to fail. In *Heuser v. Harris*, 42 Ill. 425, the donation was, as we have seen, to a school district, to be used for school purposes, and to be under the absolute control of a trustee to be elected by the people; and it was held that a court would appoint after the failure of the people to elect. The power to appoint by the people was a delegated power, and so it is here; the power of appointment of trustees by the judges under the will is delegated, and the failure to appoint in the present case could be no worse for the charity than the failure of the people to elect in the former. The citation of another case will suffice. In *Dailey v. City of*

New Haven, 60 Conn. 314 (14 L. R. A. 69, 22 Atl. 945), the devise or bequest was one-fifth of the remainder "to the City of New Haven, to be held in trust by the proper authorities, and the income to be applied through such agencies as they may see fit, to supply fuel and other necessities to deserving indigent persons, not paupers, preferring such as are aged and infirm," and one-fifth "to the president and fellows of Yale College, in trust, the income to be applied to the support of scholarships, or to such other purposes in the academical department as they may deem expedient." The City of New Haven refused to accept its trust, nor was it competent to take in such capacity, and from a survey of the will it was adjudged that the primary purpose of the testator was to appropriate the particular one-fifth of the residue of his estate to a particular charitable object specifically pointed out, and that the form of its administration was secondary only, and new trustees were appointed to administer it. But as to the Yale College donation, it was said: "Some of the trusts were in effect, and evidently so intended, gifts to the trustees. The question whether it would be of advantage to the trustee to accept or not was the only question, and a refusal might properly end the matter. Certainly the bequest to the president and fellows of Yale College to the support of scholarships, or such other purposes in the academical department as they may deem expedient, is of that nature. The direct benefit is to the college. By its very terms the trust is incapable of being administered by another." The primary object of the testator here, as gathered from the testament, is to establish and maintain a free school or schools in the town of St. Johns. His scheme of charity is fixed and definite, the manner of administering the trust is of secondary importance. He has indicated a method for its application, but it is not within the ken of human ingenuity to devise a plan that

may be observed in every particular in its execution, so that, if his particular method of administration should fail in some particular, that would not give reason for voiding the trust. For instance, it is directed that the principal of the fund to arise shall be loaned only upon real estate security. Now, if that particular form of security should fail or become unavailable, the trustees might be authorized to loan upon other sufficient securities without impairment of the trust: See *McIntire's Administrators v. City of Zanesville*, 17 Ohio St. 352. So it is of other specifications and directions touching the mode or manner of executing or administering the charity. We think it clear, therefore, that the trust should not fail by reason of the fact that the judges may not appoint the board of trustees designed by the testator to succeed the executors in the control and management of the estate funds, and prescribe rules for their government, nor because the board may not be a body of perpetual succession: See *Gould v. Taylor Orphan Asylum*, 46 Wis. 106 (50 N. W. 422); and *Dodge v. Williams*, 46 Wis. 70-101, 102 (50 N. W. 1103).

It is objected to the validity of the trust that the Circuit Court of the State of Oregon for Multnomah County, in which jurisdiction St. Johns is situated, now has four judges instead of one. Who shall appoint? Counsel say, "Manifestly neither of them, because neither of them is *the* judge. Each one of them is *a* judge, or one of the judges, but not *the* judge." It is probable, however, that an appointment by either of these judges would suffice. Surely an appointment by either would fulfill the conditions of the particular manner of executing the trust. But, should the fact of a multitude of judges prevent the appointment entirely, we have seen that the trust should not fail. The condition that the judges should appoint was not a condition precedent to vesting the right.

Another objection urged is that the district embracing the town of St. Johns has been changed as it respects the boundaries thereof, and rechanged, and is liable to be changed again; but the testator seems to have contemplated just such a condition of things, and the children of the district, whatever territory it may comprise, are the objects of the charity: See *McIntire v. City of Zanesville*, 17 Ohio St. 352; and *Heuser v. Harris*, 42 Ill. 425.

Again, it is urged that the trust must fail as it affects block 29, because no provision appears to have been made for its conveyance by the executors to the board of trustees provided for. It is not clear but that there may have been an oversight in providing the manner by which this particular piece of property should pass to the board. It was the evident intention of the testator that this block should pass to the succeeding trustees; but, if it be admitted that the manner of its devolution has not been specially provided for, it would pass either to the heirs of the executors or result to the heirs of the testator, but in either event it would be charged with the trust, and equity would place it in the proper channel of administration. It is said in the *Sailors' Snug Harbour* case: "The will looks therefore to three alternatives: 1. That the officers named in the will as trustees should take the estate and exercise the trust. 2. If that could not legally be done, then he directs his trustees to procure an act of incorporation, and vests the estate in it for the purpose of executing the trust. 3. If both these should fail, his heirs, or whosoever should possess and enjoy the property, are charged with the trust. * * * Whoever, therefore, takes the land takes it charged with these uses and trusts which are to be executed in the manner above mentioned." What the testator has said in his will to the effect that the buildings should belong to his estate, was evidently for the purpose of making it clear that he did not intend a donation to the

school district which shall embrace the town of St. Johns. And the direction that the school or schools should never be used to inculcate the doctrines of any religious sect or denomination, one more than another, is one that was perfectly competent for him to make. As to this last see *Ould v. Washington Hospital*, 95 U. S. 303.

Much has been said concerning the cy pres doctrine, but it is not apparent how it can affect this case at the present time. We have seen that the appointment of the objects of charity is a matter not personal with the judges designated to nominate the board of trustees, and much less is it personal to the executors or trustees themselves. There has been no failure of the object for which the donation was made; there is no unexpected undisposed-of surplus; no increase of funds beyond that which is needed for the purposes designed; no change in the law rendering the object unlawful; nor have there been any intervening circumstances by reason of which it has become apparent that the trust cannot be executed strictly. There may come a time when this doctrine may be invoked, but with what effect it is not now within our province to decide. The decree of the court below will be affirmed.

AFFIRMED.

ON MOTION TO CORRECT DECREE.

PER CURIAM. This is an application by Eli Morrill for the recall of the mandate issued in this cause with a view of procuring a modification of the decree of this court entered against him on December 31, 1896, as surety upon the appellant's undertaking which it is alleged was by mistake entered for an amount in excess of his liability. The proceeding was commenced in the County Court for Multnomah County, and after a decree there in favor of respondent was appealed to the Circuit Court, and Eli Mor-

rill and John Burk became sureties upon the undertaking for the appeal conditioned that "appellants shall and will well and truly pay all damages, costs, and disbursements which may be awarded against them on said appeal, and that, if said judgment be affirmed, the appellants will satisfy it so far as affirmed." The Circuit Court affirmed the decree of the County Court, and the same parties appealed to this court, and gave an undertaking with John Burk and E. J. Jeffery as sureties. This court affirmed the decree of the Circuit Court, and further decreed that the respondent have and recover of and from Eli Morrill, John Burk, and E. J. Jeffery, his costs and disbursements on appeal from the Circuit Court to this court, taxed at \$98.50, together with the costs and disbursements in the two lower courts, subsequently taxed at \$119.50.

The question presented is whether Morrill was liable upon his undertaking for the costs and disbursements incurred on appeal from the Circuit Court. We think not. Morrill's undertaking is decisive of the question. He was bound to the observance of two conditions: First, that appellants should pay all costs and disbursements awarded against them on said appeal, that is to say, upon the appeal from the County to the Circuit Court. This condition is not broad enough to comprehend costs and disbursements incurred in the appeal from the Circuit to the Supreme Court, so that Morrill is not liable for the costs of the Supreme Court under this condition. Second, that appellants will satisfy said judgment so far as affirmed. What judgment? The judgment or decree of the County Court, and this included the costs incurred in that court, as they were comprehended by that decree, and none other. The decree of the County Court was affirmed here; so was also the decree of the Circuit Court which includes the costs on appeal from the County to the Circuit Court. For all this, Morrill is liable under the two conditions of his under-

taking. But the conditions, by the most liberal construction, cannot extend to the costs and disbursements on appeal to this court. They are neither costs and disbursements on appeal to the Circuit Court, nor are they any part of the judgment or decree of the County Court. In support of this view see *Hinckley v. Kreitz*, 58 N. Y. 583. The decree having been thus entered by inadvertence, the mandate will be recalled and the decree will be corrected so as to relieve Morrill from liability for costs and disbursements on appeal from the circuit to this court.

DECREE MODIFIED.

Decided at PENDLETON July 31, 1897. ✓

BROWNFIELD v. HOUSER.

(49 Pac. 843.)

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INJUNCTION BY PRIVATE CITIZEN—ILLEGAL DEBTS.—A taxpayer may maintain a suit in his own name to restrain the creation of an illegal debt by a municipal corporation where the effect of such corporate action will be to increase his burden of taxation (*State v. Pennoyer*, 26 Or. 205, and *Dorothy v. Pierce*, 27 Or. 373, cited and approved); but where the funds have already been misapplied and are gone, the proper party to complain is the injured corporation, either in its own name or on the relation of some proper person.

CONSTITUTIONAL LAW—FEES OF OFFICERS.—The act of 1893, as amended (Laws 1895, p. 77), fixing the compensation of sheriffs, clerks, and other county officers, does not violate article IV, section 23, subd. 10, of the State constitution, prohibiting special or local laws for the assessment and collection of road, township or county taxes, even if it be conceded that the fees collected by said officials are taxes: *Northern Counties' Trust v. Sears*, 30 Or. 388, followed.

INJUNCTION BY TAXPAYER TO PREVENT THREATENED INJURY.—A private taxpayer may maintain a suit to enjoin the issuance of a warrant for items illegally allowed by the county court.

"EXPENSE ACCOUNTS" OF SHERIFFS—ITEMIZED BILL.—Section 6 of the act of 1895 (Laws 1895, p. 81), precludes a sheriff from being reimbursed by a county for any expense that he may incur in the course of traveling on official business within his county, and for mileage, as such, while traveling without the county to receive a prisoner already in custody. When a claim for expenses is made under this latter clause, it must be in the form of a detailed account, accompanied by the proper proofs, so that the auditing officer can determine whether each item was an actual expense necessarily incurred.

EXPENSES OF SHERIFF—MILEAGE.—Mileage, as such, except in the cases mentioned in the last clause of section 6, was abolished by the fee bill of 1895 (Laws 1895, p. 77), and a sheriff traveling outside of his county to receive a prisoner is entitled to be reimbursed for only his actual necessary outlay.

OFFSET AGAINST SHERIFF'S ACCOUNT.—In a suit by a taxpayer to enjoin the county clerk from issuing to the sheriff a warrant for a claim allowed by the County Court, payments theretofore made by the county to the sheriff cannot be inquired into, or offset against the portion of his account conceded to be valid.

From Umatilla: STEPHEN A. LOWELL, Judge.

Suit by C. W. Brownfield to restrain the officials of Umatilla County from issuing to Zoeth Houser, the county sheriff, a warrant for a certain sum theretofore audited and allowed by the County Court, but claimed to be partly composed of items that were properly not chargeable against the county; and to obtain an accounting of sundry amounts said to have been before improperly paid to the sheriff. Plaintiff appeals from an order sustaining a demurrer to his complaint.

REVERSED.

For appellant there was a brief over the names of *Balleray & Butler*, with an oral argument by *Mr. John J. Balleray*.

For respondents there was a brief over the names of *L. B. Reeder* and *Carter & Raley*, with an oral argument by *Mr. James H. Raley* and *Mr. Reeder*.

Opinion by MR. CHIEF JUSTICE MOORE.

This is a suit to restrain the county clerk of Umatilla County from issuing to Zoeth Houser a county order for services performed by him as sheriff. The plaintiff alleges that he is a resident taxpayer of Umatilla County, and that Zoeth Houser is sheriff, William Martin county

judge, John H. Adams and T. P. Gilliland are county commissioners, and Benjamin S. Burroughs is county clerk, of said county; that said sheriff is entitled by law to receive from said county an annual salary of \$2,500, and, in addition thereto, certain compensation for the board and keeping of persons imprisoned in the county jail, and also his actual and necessary expenses when required to travel in another county or state to make an arrest or receive a prisoner; that in May, 1896, the County Court audited a claim of said sheriff for \$1,067.25, of which the following items were illegally allowed: Inland Telephone & Telegraph Co., \$23.50; Blue Mountain Telephone & Telegraph Co., \$1.25; mileage, \$221.60; expenses of Laura Strickler to refuge home, \$50.00; fare of Fred Lloyd to Echo, \$2.25; Daniel McKeen, fare to reform school, \$14.00; fare and expenses of G. W. Hull to Roseburg, \$14.55; sundry bills, \$100.87; that the warrant therefor has not been issued, but the county clerk threatens to draw and deliver the same to the said Houser, and, unless restrained, will carry his menace into execution, thereby injuriously affecting plaintiff's pecuniary rights as a taxpayer, for which injury, if permitted, he has no adequate remedy at law. It is further alleged that the County Court at its regular terms, from September, 1894, to March, 1896, illegally audited and allowed accounts presented to it by Houser for services claimed to have been performed, the items of which are set out, whereby he has been permitted to draw from the treasury of said county the sum of \$6,684.59 more than he was entitled to receive, and prays that he may be required to account for and pay into the county treasury all moneys so illegally drawn therefrom, and that the county clerk may be enjoined from issuing to him any county orders for services claimed to have been performed by him. A demurrer to the complaint on the grounds that it did not state facts sufficient to constitute

a cause of suit, that several causes were improperly joined, and that plaintiff had no legal capacity to sue, having been sustained for alleged misjoinder, the plaintiff declined to plead further, whereupon a decree was rendered dismissing the suit from which he appeals.

The right of a taxpayer, in his own name, to have a municipal corporation and its officers restrained from illegally creating debts, thereby increasing the burden of taxation, has been recognized in this State (*Carman v. Woodruff*, 10 Or. 133; *Wormington v. Pierce*, 22 Or. 606, 30 Pac. 450; *Sherman v. Bellows*, 24 Or. 553, 34 Pac. 549; *State v. Pennoyer*, 26 Or. 205, 25 L. R. A. 862, 37 Pac. 906; *Dorothy v. Pierce*, 27 Or. 375, 41 Pac. 668); and hence the important questions raised by the demurrer are whether there is a misjoinder of causes of suit, and, if not, does the complaint state facts sufficient to entitle plaintiff to the relief demanded, or any part thereof.

Assuming that the money alleged to have been drawn from the county treasury by Houser prior to May, 1896, was so drawn upon county orders illegally authorized by the County Court, and that the county, in its corporate capacity, or upon the relation of a proper person, may maintain an action for its recovery, can the plaintiff in his own name assert a similar right, or compel the sheriff to account for or pay it over to the county treasurer? It would seem, upon principle, that the right of a taxpayer in his own name to restrain a municipal corporation and its officers from illegally creating a debt or disposing of the corporate property or funds must rest upon the doctrine of necessity for prompt action on the part of some one to prevent a threatened injury to the public; and, as the taxpayer is one of the persons who will be injuriously affected by the misapplication of the funds of the corporation by the agents thereof, and must necessarily be compelled to bear an additional burden if the menace be

carried into execution, equity considers him a real party in interest, and, as a trustee for the public, permits him to invoke injunctive relief. But where the officers of a municipality have already misapplied its funds, the mischief is accomplished and the injury completed, in which case the necessity for an extraordinary remedy does not exist. To allow a taxpayer in his own name to maintain an action to recover corporate property or funds after they had been diverted would be equivalent to opening wide the doors to an indefinite number of actions by persons similarly situated, thereby subjecting the officers and corporation to interminable litigation: 2 Dillon on Municipal Corporations, § 921. When the injury is complete, the unlawful diversion of public funds falls directly upon the municipal corporation and remotely upon each taxpayer, and, since the corporation is the actual party sustaining the direct result of the injury, so should it also be the real party in interest, either in its own corporate name or upon the relation of a proper person to prosecute an action for the redress of the injury after its consummation.

The complaint having alleged that Houser unlawfully obtained from Umatilla County the sum of \$6,684.59, which it prayed he might be required to account for and repay, if the facts thus stated were relied upon as constituting an independent cause of suit, the demurrer for misjoinder was no doubt properly sustained; but we think a fair interpretation of the pleading leads to the conclusion that the facts so stated were relied upon only as furnishing an offset to the sheriff's account of May, 1896, for board of prisoners, \$22.57, and salary for two months, \$416.66, which it is admitted were proper charges against the county. The plaintiff claims that the County Court ought not to have audited these two items of the sheriff's account, for the reason, as he alleges, that Houser had theretofore received other sums in excess thereof to which

he was not entitled, and which the County Court had no legal authority to award. We think this allegation explains the preceding averment, and shows the intent of the pleader, in view of which a motion to strike out would probably have corrected the pleading, and hence the court erred in sustaining the demurrer.

We come now to an examination of the sufficiency of the complaint to state a cause of suit for injunctive relief. Counsel for defendants contend that the general demurrer should have been sustained, for the reason that the salary law upon which the plaintiff relies contravenes subdivision 10 of section 23, article IV, of the State constitution, which inhibits the passage of special or local laws for the assessment and collection of taxes for state, county, township, and road purposes. In *Northern Counties Trust v. Sears*, 30 Or. 388 (41 Pac. 931, 35 L. R. A. 188), Mr. Justice WOLVERTON has so completely and lucidly met and answered this objection as to render any further examination of the question unnecessary.

It is also contended that the County Court, having audited Houser's claim, thereby exercised a judicial discretion in determining the amount due him, and if a mistake were made in the conclusion reached it was, in the absence of any allegation of fraud, one of law and not of fact, which precludes the county, even, from maintaining an action thereon. There is seemingly quite a conflict of decisions upon this question, some courts holding that the same reasons which would prevent an individual from recovering back money thus paid should prevail, in the absence of fraud, against a municipal corporation (*Advertiser Co. v. Detroit*, 43 Mich. 116, 5 N. W. 72; *County of Wayne v. Randall*, 43 Mich. 137, 5 N. W. 75; *Cox v. Mayor of New York*, 103 N. Y. 518, 9 N. E. 48), while others hold that a county may offset against the salary of a county official moneys received by him from its treasury

to which he is not entitled by law: *County of Cook v. Wren*, 43 Ill. App. 388. We will refrain from passing upon the effect of the County Court's unwarrantable exercise of judicial discretion in allowing Houser's claim, and shall predicate the plaintiff's right upon the allegation that the money has not been paid under such allowance. This right is based upon the plaintiff's threatened injury, and his remedy, if any, consists in restraining the county clerk from issuing to Houser a county order for expenses which, it is alleged, were illegally allowed. If the money had been paid by the county, the injury would be complete, in which case it must be admitted that the right of a taxpayer, in his own name, to invoke injunctive relief or maintain an action against an officer for money had and received should be denied. But here, although the claim has been allowed, no warrant evidencing the amount thereof has been issued, without which no payment can be made thereon out of the county funds, and until this has been done the right of a taxpayer to invoke the aid of equity to prevent the threatened injury should be recognized.

The unpaid bill of May, 1896, contains, among others, the following charge: "Mileage, \$221.60." The statute, having prescribed an annual salary for the sheriff, precludes any charge for expenses incurred on account of travel necessitated by the performance of his official duties in Umatilla County. Nor is he entitled to compensation for "mileage," as such, when compelled to travel in another county or state to make an arrest or receive a prisoner. The County Court having audited and allowed this item, it, no doubt, considered that the charge was a valid claim against the county for expenses incurred by the sheriff in being compelled to travel in another county or state; but, before he can claim to be reimbursed therefor, he must file with the county clerk an account of his actual and

necessary expenses: Laws 1895, p. 77, § 6. The actual expense incurred may not have been necessary, for the sheriff might possibly hire a team and carriage with which to make a long journey or to transport a prisoner, when he could be better accommodated by traveling on the cars, and thereby lessen the expense, also, in which case the County Court might find that the expense incurred was unnecessary, and refuse to audit or allow the bill for more than the necessary outlay. The "expense account" demanded by the statute must mean a detailed statement of the several items constituting the charge, and not a lumping sum; otherwise the County Court could not intelligently act upon or audit the bill. If this charge represents the actual expenses of the sheriff incurred while traveling in another county or state in the performance of official duty, he is entitled to be reimbursed for the outlay; but if "mileage" as such—which was intended by the legislative assembly to be abolished—is sought to be recovered, the County Court had no authority to audit the claim therefor. In all claims of this character we think the ends of justice would be subserved by requiring the sheriff to make proof of the bona fides thereof.

As to the other items of the sheriff's bill of May, 1896, they are, no doubt, proper charges against the county, and such as the County Court ought to allow. It is evident that the business pertaining to the sheriff's office can be more expeditiously transacted by permitting the sheriff to make use of the telephone and telegraph in the performance of his official duties. Deprived of these means for the rapid transmission of information, he would be unable to cope with expert criminals, and Umatilla County would become a paradise to law-breakers who were not caught in the act of violating the law. The item, "sundry bills, \$100.87," having been audited and allowed, is, no doubt, a proper charge against the county, but a memo-

randum of the items thereof should have been attached to the bill, in the absence of which it is vulnerable to the objection urged against it. The other items of the account speak for themselves; but the plaintiff having alleged that they also are illegal renders it necessary that an issue should be framed and this illegality established, if he would enjoin their payment; but he has no right in this suit to inquire into or offset any payments heretofore made by the county against that portion of the sheriff's account which he concedes to be valid. It follows that the decree is reversed, and the cause remanded with directions to overrule the demurrer, and for such further proceedings as may be necessary, not inconsistent with this opinion.

REVERSED.

Decided April 5, 1897; rehearing denied.

FRATT v. WILSON.

(47 Pac. 706; 48 Pac. 356.)

1. **APPEAL—JURISDICTION OF SUPREME COURT—FILING TRANSCRIPT.**—Where the parties stipulate that a printed abstract shall be filed in lieu of the usual transcript on appeal (rules 4 and 13, Rules of Supreme Court, 24 Or. pp. 595, 601), one of them cannot afterwards object that the court has no jurisdiction, under section 541, Hill's Code, providing that the jurisdiction of the appellate court shall attach only on filing the transcript.
2. **SERVICE OF PROCESS IN TRANSITORY ACTIONS AGAINST NON-RESIDENTS.**—The expression, "none of the parties," found in the latter part of section 44 of Hill's Code, means none of the defendants: so that in a transitory action a non-resident of this State may be sued in any county that the plaintiff may select, and personal service anywhere within the State will be good: *Dunham v. Shindler*, 17 Or. 256, and *Brown v. Deschuttes Bridge Co.*, 23 Or. 7, distinguished.
3. **IDEM.**—The expression, "none of the parties reside in this state," found in section 44 of Hill's Code, refers to all non-resident defendants, whether they are found in the State or are absent therefrom.

From Multnomah: E. D. SHATTUCK, Judge.

This is an appeal from an order of the trial court overruling a motion to set aside a default order and judgment.

It appears from the record that Francis Fratt sued H. C. Wilson, in Multnomah County, on a transitory cause of action, and caused the summons to be served on the defendant personally in Lake County. Wilson was at the time a resident of California, but was temporarily in Lake County on business. No appearance was made, and in due time plaintiff obtained a judgment for want of an answer. Afterward defendant applied to the court to set aside this judgment, on the ground that the court had no jurisdiction over the person of the defendant, and that the judgment was and is wholly void. After due consideration the motion was overruled.

For the purpose of perfecting an appeal, the appellant filed in the upper court a printed abstract of the record in the form indicated by Rules 5, 7 and 9 of that court (24 Or. 595, 600), attached to which was a stipulation under Rule 13 (24 Or. 601), that the case might be heard on the printed abstract alone, viz.: "It is hereby agreed by and between the plaintiff and defendant herein, through and by their respective attorneys, that this case shall be tried in the Supreme Court upon the foregoing abstract, without a transcript, and that no transcript shall be filed therein." No transcript having been filed in the upper court by the first day of the next term, as provided for by section 541 of Hill's Code, the respondent moved to dismiss the appeal.

MOTION OVERRULED: AFFIRMED.

For appellant there was a brief over the names of *Hammond & Vawter*, and *Lionel R. Webster*, with an oral argument by *Mr. A. S. Hammond*.

For respondent there was a brief and an oral argument by *Mr. William M. Gregory*.

ON MOTION TO DISMISS APPEAL.

PER CURIAM. 1. This is a motion to dismiss an appeal. The record shows that the appeal was regularly taken and perfected, but, instead of the usual transcript of the cause, there was filed in this court a printed abstract thereof, by agreement of the parties hereto, entered into in pursuance of Rule 13 (24 Or. 601, 37 Pac. 8). Plaintiff's counsel now contend that jurisdiction cannot be conferred by consent of the parties, and, under section 541, Hill's Code, is not acquired until the transcript is filed, and that, even if the abstract be regarded as supplying the place of the transcript, the one filed herein is not sufficient to enable the court to determine the appeal upon its merits, and for these reasons move to dismiss it. Whether the notice of appeal is to be considered in the nature of process, upon the service of which this court obtains jurisdiction, and the transcript as the evidence by which the judgment is to be reviewed on appeal, so that the parties might stipulate the facts involved and ask a construction of the law arising thereon, or whether the filing of the transcript is to be deemed the final act, without which no jurisdiction can be obtained, we do not feel called upon to decide, for the plaintiff, having stipulated with the defendant that the printed abstract should be deemed sufficient for the trial of the cause on appeal, is not in a position to controvert the legal effect of his agreement upon the faith of which the defendant presumptively relied. An examination of the abstract leads us to the conclusion that it fairly presents the questions involved, and hence the motion to dismiss the appeal is overruled.

MOTION OVERRULED.

ON THE MERITS.

Opinion by MR. JUSTICE BEAN.

2. H. C. Wilson, a resident of California, was sued by Francis Fratt, in Multnomah County, in an ordinary action to recover money, and service made upon him while temporarily in Lake County, and the sole question to be determined on this appeal is whether the judgment subsequently rendered by default is void for want of jurisdiction. The contention for the defendant is that personal service of a summons in this State on a non-resident, in a transitory action, does not confer jurisdiction of his person, unless made in the county where the action is pending; while the plaintiff claims that the action may be commenced in any county which the plaintiff may designate in his complaint, and service be made elsewhere in the State. The statute regulating the place of trial of such actions provides that they "shall be commenced and tried in the county in which the defendants or either of them reside, or may be found, at the commencement of the action; or, if none of the parties reside in this State, it may be tried in any county which the plaintiff may designate in his complaint": Hill's Code, § 44. In *Brown v. Deschuttes Bridge Co.*, 23 Or. 7 (35 Pac. 177); and in *Dunham v. Shindler*, 17 Or. 256 (20 Pac. 326), it was held that a transitory action against a resident of the State must, under this statute, be commenced in the county where he resides or is found at the commencement of the action, or the judgment is a nullity; and the defendant claims that all persons personally present in the State, whether temporarily or not, are residents of the county in which they are found, for jurisdictional purposes, and under these decisions can be sued only in such county. In support of this position his counsel cite several authorities to the

effect that the bodily presence of a non-resident is equivalent to residence for jurisdictional purposes: *Alley v. Caspari*, 80 Me. 234 (14 Atl. 12); *Murphy v. Winter*, 18 Ga. 690; *Thompson v. Cowell*, 148 Mass. 552 (20 N. E. 170). These authorities only announce the familiar and universally recognized doctrine that a citizen of one state, upon going voluntarily into another, submits himself to the jurisdiction of the courts of the latter. The question before us, however, is not whether process served upon a non-resident while temporarily in the state will confer jurisdiction of his person, but whether such process can be served out of the county in which the action is pending, and therefore the authorities cited are not in point. The question of the sufficiency of such service must be determined by the provisions of the statute quoted, and if we are to give to the language thereof its ordinary and generally accepted meaning, there can, in our opinion, be no difficulty in the matter. The statute was manifestly designed to fix the place of trial of transitory actions against two different classes of persons, viz.: persons residing in the State and those not so residing. The first clause of the section clearly refers to persons who are residents of the State, and as to them the action must be commenced "in the county where the defendants or either of them reside, or may be found, at the commencement of the action"; while the latter clause just as clearly refers to persons residing out of the State, and as to them it provides that the action may be commenced "in any county which the plaintiff may designate in his complaint." This is but giving to the words of the statute their general import and customary meaning, and we do not see why they should not be so construed. The legislature evidently thought a different rule should prevail in actions brought against its own citizens from those brought

against non-residents, and it is not for the courts to speculate as to the sufficiency of the reasons therefor.

3. The defendant claims, however, that the latter clause of the section referred to was intended to apply only to non-residents who could not be served with process in the State, and not to such persons when found therein; but the statute itself makes no such exception, and we are not authorized to make any. By the language of the statute it is declared that if the defendant does not reside in the State the action may be commenced in any county which the plaintiff may designate in his complaint, and this provision was admittedly complied with in this case, hence the judgment is not void, and must be affirmed.

AFFIRMED.

Decided April 5, 1897; rehearing denied.

COOS BAY R. R. CO. v. NOSLER.

(48 Pac. 361.)

30	547
130	586
30	547
337	302
30	547
46	45

RAILROAD SUBSIDY—DEPENDENT AND INDEPENDENT COVENANTS IN CONTRACTS.—A railroad subsidy agreement provided that the subscriber would pay certain proportions of his subsidy as certain parts of the work should be completed, and the balance when the road should be built to the terminal point; the railroad company agreeing to finish the road by a certain date, and to maintain a depot at an intermediate town, with a certain switch. *Held*, that the part payments were earned absolutely by the completion of the respective parts of the road, without regard to the time of the final completion, or of the construction of the depot or switch; and the completion at the specified time is a condition precedent to the payment of only the balance.

REMOTE AND SPECULATIVE DAMAGES—CONTRACTS.—The loss of anticipated profits from the additional value which would have been conferred upon town lots by the construction of a railroad to the town in accordance with a subsidy contract is too remote and speculative to be available as a recoupment or set-off in an action by the company upon the contract: *Blagen v. Thompson*, 23 Or. 239, distinguished.

RECOVERY OF PART OF SUBSIDY—FAILURE OF CONSIDERATION.—The mere failure to complete a railroad within the time specified by a subsidy contract is not such a total failure of consideration as will entitle a subscriber thereto to recover an installment paid in

accordance with the contract upon the prosecution of the work to an intermediate point, in the absence of any evidence as to the actual damages sustained.

From Coos: J. C. FULLERTON, Judge.

This is an action to recover upon a subsidy agreement signed by the defendant with others and delivered to plaintiff. The agreement is as follows: "We, the undersigned, agree to pay to the Coos Bay, Roseburg & Eastern Railroad & Navigation Company the sums set opposite our names, respectively, in the manner following, to wit: Twenty-five per cent. when the first ten miles of said road are graded, commencing at or near Marshfield, Coos County, Oregon, and running eastward toward Roseburg, and via Coquille City and Myrtle Point; twenty per cent. when the rails are laid on the first ten miles; twenty-five per cent. when the second ten miles are graded; twenty per cent. when the rails are laid on the second ten miles; and the balance when the road is completed to Myrtle Point, Oregon. As a consideration for the following subscriptions, the said railroad company will maintain a depot within the corporate limits of Coquille City, Oregon, and a switch to tide water in the Coquille River at Coquille City, provided right of way and ground for wharfage are furnished. Road to be finished to Myrtle Point before January 1, 1891, and to Roseburg by December 31, 1891.

(Signed)

J. H. NOSLER. \$1,000.00."

Subsequently, the following notification thereof was executed by defendant, and delivered to and accepted by plaintiff, viz.: "Whereas, on or about the — day of June, A. D. 1890, the undersigned did enter into a certain contract with the Coos Bay, Roseburg & Eastern Railroad Company in relation to the payment of certain sums set after our names, in the event of a railroad being con-

structed as therein set forth, now therefore, for the consideration therein expressed, we, each for himself, agree to and with said company that said contract shall be and the same is hereby changed so that the following clause, to wit: 'Road to be completed to Myrtle Point by January 1, 1891, and to Roseburg by December 31, 1891,' shall read as follows, to wit: 'Road to be finished to Myrtle Point from Marshfield before May 1, 1891, and to Roseburg within a year from the time it reaches Myrtle Point.' We also agree that in case any delay is caused by reason of the procuring of the rights of way, collection of Coos County or Roseburg subsidy, or other just cause, that the aforesaid times shall be extended a reasonable time further to cover such delays. This is upon the understanding that the survey be commenced immediately, and work follow without delay.

(Signed)

J. H. NOSLER."

It is alleged in the complaint that there became due and payable to plaintiff under the agreement the following installments, to wit: On February 5, 1891, \$250; November 30, 1891, \$200; July 12, 1893, \$250; July 19, 1893, \$200; and on August 25, 1893, \$100.

The defendant interposed three several defenses by way of recoupment or set-off. The first is based upon the condition that plaintiff was to maintain a switch to tide water at Coquille City, which it is alleged it has failed to observe, although the right of way and ground for wharfage have been furnished, for which defendant claims damages in the sum of \$250. The second is based upon anticipated profits, fixed at \$5,000, which it is claimed defendant could have realized from his real property in and adjoining Coquille City if the road had been constructed according to the terms of the agreement. And, third, upon the alleged payment of \$250 towards his subscrip-

tion on February 5, 1891, the consideration for which it is claimed has wholly failed, by reason of the plaintiff's failure to complete the road to Myrtle Point, or to extend the same to Roseburg, within the times stipulated, for which amount, with interest from the date of payment, he prays judgment. Proof was offered by the defendant, and admitted over plaintiff's objection, tending to support the second defense, and the court's instructions were in support of the validity thereof, to which objection was also made, and error is assigned because such objections were not sustained. Another instruction excepted to by plaintiff is as follows: "It is admitted in the pleadings that defendant paid to plaintiff the sum of \$250, the same being the amount due from defendant under said contract when the first ten miles of said railroad was graded. If you find from the evidence in this case that plaintiff has not constructed the said railroad to Myrtle Point within a reasonable time, as provided in said contract, under the instruction I have heretofore given you, then defendant is entitled to recover the same from plaintiff, and you should so find by your verdict." The verdict was for defendant for \$250, with interest at eight per cent. per annum from February 5, 1891, and, judgment being given in accordance therewith, plaintiff appeals.

REVERSED.

For appellant there was a brief over the names of *J. W. Hamilton* and *John A. Gray*, with an oral argument by *Mr. Hamilton*.

For respondent there was a brief by *Mr. James F. Watson*, with an oral argument by *Messrs. A. J. Sherwood, Edward B. Watson, Andrew M. Crawford, and Wm. R. Willis*.

MR. JUSTICE WOLVERTON, after making the foregoing statement of the facts, delivered the opinion of the court.

A solution of the most important questions arising in this case depends upon the proper construction of the subsidy agreement as modified. The purpose of the action is to recover under the agreement, so that, when we have determined its true meaning, the measure of plaintiff's remedy will become manifest; so will also the remedial rights of the defendant. Whether performance is necessary to a recovery, and therefore constitutes a condition precedent, must be determined by the intention of the parties to the contract, and that intention must be ascertained from the terms of the agreement itself and the circumstances attending its execution. "It cannot depend," says Lord Ellenborough, "on any formal arrangement of the words, but on the reason and sense of the thing as it is to be collected from the whole contract": 1 Addison on Contracts (Abbott & Woods' Ed.), *182; *Glaholm v. Hays*, 2 Mann. & Gran. 265; *McLure v. Rush*, 9 Dana, 65; *Larimore v. Tyler*, 88 Mo. 661. Certain rules have been laid down by which to ascertain and discover such intention, but it is only necessary to refer now to such as are applicable to the case before us. If, by the terms of a contract, money is to be paid by a day certain which is to or may happen before the performance of the service, or by a day certain and there is no day certain for the performance, the performance is not a condition precedent, and the party may sue for the money without averring or showing performance. In such case the parties are left to the mutual remedies on which they obviously depended: *Cunningham v. Morrell*, 10 Johns. 202 (6 Am. Dec. 332). But where a day is appointed for the payment of money, subsequent to the performance of that which is the consideration therefor, no action can be

before performance: *Middle-*
ton v. P. & N. R. Co., 14; *Rider v. Pond*, 18 Barb. 179.
 If the making goes only to a part of the
 contract, and the breach thereof may
 be remedied by damages, it is then an independent
 contract. If the undertakings are mutual, and go
 to the completion of the contract, they are to be considered as
 one contract, and there must be a performance
 of the whole before a recovery can be had. Mr. Parsons
 states the general rule, "that if the supposed condition
 is a condition of the ground of the contract, and cannot be
 performed in whole or from any part of it, a breach of the
 condition is a breach of the whole contract, which gives
 the injured party the right of avoiding or rescinding it
 altogether." But where the supposed condition is dis-
 cretely made, so that much of the contract may be
 performed on both sides, as though the condition were
 not made, it will be read as a stipulation, the breach of
 which gives an action to the injured party: 2 Par-
 sons on Contracts, *527; see also *Bean v. Atwater*, 10
 Cal. 31; *Dermott v. Jones*, 64 U. S. (23 How.), 220;
 2 Parsons on Contracts (Abbott & Woods' Ed.), *190. For
 discussions and illustrations of the rules here alluded
 to, see note by Mr. Sargeant Williams to *Pordage v. Cole*,
 10 Saund. 319 i; 2 Parsons on Contracts, 521, note (r).
 Guided by these rules, we find no difficulty in arriving
 at a satisfactory interpretation of the agreement in ques-
 tion. The defendant undertook to pay plaintiff twenty-
 five per cent. of his subscription when the first ten miles
 were graded, running eastward from Marshfield; twenty
 per cent. when the rails were laid, etc., and the balance, or
 ten per cent., when the road was completed to Myrtle
 Point. The payment of the last installment and the com-
 pletion of the road to Myrtle Point were to be concurrent
 events, and are therefore mutual and dependent; but, as

touching all other payments, it was contemplated, and so considered by the parties, that they should be made prior to the completion of the road to Myrtle Point, and dependent only upon the completion of the designated sections thereof. The plaintiff has its right of action for the apportioned consideration as soon as it has performed the designated work, because it has earned it, and is entitled to it under the agreement. The stipulation for completion of the modified agreement is as follows: "Road to be finished to Myrtle Point from Marshfield before May 1, 1891, and to Roseburg within a year from the time it reaches Myrtle Point." It was also agreed that in case delay was caused by reason of the procuring of the rights of way, collection of the Coos County or Roseburg subsidy, or other just cause, that the times named should be extended a reasonable time to cover such delays. The time designated for the completion of the road to Myrtle Point must be considered as material, because the parties evidently so intended it from the first, and so treated it in the execution and acceptance of the modified agreement. The plaintiff was required to complete the road so far within the time fixed, and if it failed, it was in default; but such default would not affect any right of action which might have accrued to it theretofore under the agreement for the completion of specified portions of the work. It could not, however, recover upon the dependent undertaking, unless the defendant waived the stipulation touching such time of completion, nor could it recover upon such of the independent covenants respecting which performance had been delayed beyond the time fixed for such completion to Myrtle Point. Whatever may be the rule in equity respecting the matter, at law time within which a contract is to be performed is generally regarded as material, and no action can be maintained for recovery where performance does not take

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exercise of eminent domain. Whatever of peculiar or especial benefit might accrue or result to the lands of the party claiming damages may be offset, but remote or speculative benefits in anticipation of a rise in property for townsite purposes, or, generally, by reason of the proposed opening of a highway, construction of a railroad, or other improvements, cannot be considered. Such benefits are the common privilege of all the individuals of the community, and one cannot be permitted to profit by it more than another: *Beekman v. Jackson County*, 18 Or. 283 (22 Pac. 1074); *Mills' Eminent Domain*, §§ 152, 153; *Whitely v. Mississippi Boom Co.*, 38 Minn. 523 (38 N. W. 753); *Wyandotte Ry. Co. v. Waldo*, 70 Mo. 629. The same principle has been applied in cases where a city sought to recover damages from a railroad company for failure to comply with certain conditions of a subscription contract after the city had fully complied upon its part: *Missouri, etc., Ry. Co. v. City of Ft. Scott*, 15 Kan. 435; see also *Missouri, etc., Ry. Co. v. Thompson*, 24 Kan. 170. So has it to individuals: *Cincinnati Ry. Co. v. Bensley*, 51 Fed. 738 (2 C. C. A. 480). *Blagen v. Thompson*, 23 Or. 239 (31 Pac. 647, 18 L. R. A. 315), is not in point, nor can the doctrine therein enunciated be made available in support of defendant's position. It cannot reasonably be supposed that a railroad company, in accepting subscriptions of subsidies in aid of the construction of its road, should have had in contemplation damages of the nature discussed that might accrue to each individual subscriber should it fail in its enterprise. Such damages would not be the approximate and natural consequences of the breach.

Much of what has been said will apply to the attempt to recoup for the installment of \$250 paid. If it is true that the plaintiff completed the grading of the first ten miles of the road eastward from Marshfield by February

5, 1891, then the plaintiff had earned this sum, and, being justly due, it has been paid. Before the defendant can recoup he must show that he has been damaged. There has not been a complete failure on the part of the company to build the road; indeed, it was later constructed to Myrtle Point, but not at the exact time in which the company was required to build it. So it cannot be said that there has been a total failure of consideration for the subscription. In the case of *Fort Wayne Electric Light Co. v. Miller*, 131 Ind. 499 (30 N. E. 23, 14 L. R. A. 804), the sole and only consideration for the subsidy had, in effect, entirely failed, and hence it was maintained that the amount paid was the measure of the recovery. But the case here is different; there has been a substantial compliance with the conditions of the subscription, that is to say, a very substantial and material condition of the subsidy has been complied with, and hence there is not a total failure of consideration. The defendant can show and recoup such special and approximate damages as he has sustained by reason of the breach by plaintiff in not completing the road to Myrtle Point at the time fixed, if such is the case, and by failure to construct to Roseburg, but for such damages as have been shared by the community in general, and himself among the rest, he can have no claim. For these considerations the judgment of the court below is reversed, and a new trial ordered.

REVERSED.

Argued December 9, 1896; decided March 16, 1897.

DUNDEE INVESTMENT CO. v. HORNER.

(48 Pac. 175.)

30	558
43	609

430	558
148	378

LIMITATION OF ACTIONS—SECTION 24 OF HILL'S CODE AS A RULE OF EVIDENCE.—The effect of any payment of principal or interest with regard to the running of the statute of limitations is not influenced by section 24 of Hill's Code, providing that no acknowledgment or promise shall be sufficient evidence of a new or continuing contract to take a case out of the operation of the statute, unless the same is in writing, signed by the party to be charged; this simply prescribes the character of evidence by which the acknowledgment or promise shall be proven, and in no wise affects the legal consequence of a part payment.

STATUTE OF LIMITATIONS—EFFECT OF PART PAYMENT—CODE, § 25.—Section 25, Hill's Code, providing that whenever a part payment is made on an existing debt the limitation shall commence from the date of the last payment, applies only to payments before the statute has run, and does not operate to revive a debt that has already expired: *Creighton v. Vincent*, 10 Or. 56, cited and approved.

WHEN PART PAYMENT WILL NOT TOLL THE STATUTE OF LIMITATIONS.—A payment on a debt by a person who is in no way liable to the creditor, and who has no property interest to be protected against the enforcement of the debt, will not prevent the running of the statute of limitations in favor of the persons liable thereon, or on whose property it is a charge. This rule is not affected by section 25 of Hill's Code, providing that whenever any payment of principal or interest is made on an existing contract after the same becomes due, the limitation shall commence from the time the last payment is made.

IDEM.—One who purchases mortgaged premises without assuming payment of the mortgage has no such interest after a sale of the premises on a covenant of warranty as will make a payment by him on the mortgage debt effective to remove the bar of the statute of limitations as against either the person liable for the debt or the owner of the land.

STATUTE OF LIMITATIONS—PAYMENT BY GRANTEE OF MORTGAGOR.—The mere fact that the mortgagor's grantee is liable on his covenants of warranty does not make his payments effective to toll the statutes, either against the original debtor or the subsequent grantees.

From Multnomah: LOYAL B. STEARNS, Judge.

Suit by the Dundee Mortgage & Trust Investment Company against Josiah Horner and others to foreclose

a mortgage. From a decree entered after overruling a demurrer to the complaint, the defendants appeal.

REVERSED.

For appellants there was a brief over the names of *William W. Page* and *John T. Milner*, with an oral argument by *Mr. Page*.

For respondent there was a brief over the name of *Bronaugh, McArthur, Fenton & Bronaugh*, with an oral argument by *Mr. Wm. D. Fenton*.

Opinion by MR. JUSTICE BEAN.

This is a suit to foreclose a mortgage, and the sole question is whether payments made thereon by a grantee of the mortgagor, after he has sold and conveyed the mortgaged premises by warranty deed, will prevent the statute of limitations from running in favor of his grantees. The facts are that on November 18, 1876, the defendants Horner and wife gave to plaintiff's assignor a mortgage on certain real property in the City of Portland to secure a loan of \$1,200, payable in installments, the last of which became due on the 1st day of December, 1881. A short time thereafter Horner conveyed the mortgaged premises to one A. P. Ankeny, and he to A. J. Watson, who, prior to August 25, 1880, sold and conveyed the same in separate parcels to sundry persons, who are either parties to this suit or the grantors of such parties. The several deeds under which the defendants deraign title from Horner contain general covenants of warranty against the lawful claims and demands of all persons, but, so far as the record discloses, no reference whatever was made in any of them to the mortgage in question. After Watson had sold the property, he paid the

interest on the mortgage debt up to the time of his death, and thereafter his administratrix continued to do so until December 1, 1891, since which time no payments whatever have been made. This suit was commenced on the 17th day of November, 1893, more than ten years after the cause of suit accrued, and more than ten years after Watson parted with his estate in the mortgaged premises, and is therefore barred by the statute of limitations unless the payments made by him after he ceased to own the property had the effect to prevent the running of the statute.

The provisions of our statute in reference to the effect of a part payment on an obligation of the kind under consideration differ in some respects from that in force at this time in any other state, so far as we have been able to ascertain, and therefore the authorities cited and examined throw but little light upon the question before us, except as they may elucidate the general principles by which such questions are governed. Section 24 of Hill's Code, which provides that no acknowledgment or promise shall be sufficient evidence of a new or continuing contract to take a case out of the operation of the statute, unless the same is in writing signed by the party to be charged, does not alter the effect of any payment of principal or interest. It simply prescribes the character of evidence by which such acknowledgment or promise shall be proven, but in no way affects the legal consequence of part payment. A like provision is in force in most of the states, and under it, by the consensus of authority, a part payment, to take a case out of the operation of the statute, must have been made by the party to be charged with the effect of it, or by his authority. This rule is founded upon the principle that a part payment is considered an acknowledgment by the debtor of his liability for the whole amount due, from which a new promise to

pay the residue is implied, thus forming the basis of a new contract supported by the original consideration; and, under this theory, such payment must necessarily be made by some person having authority to make such a contract on behalf of the party to be charged: 1 Wood on Limitations, 280; 13 Am. & Eng. Enc. Law (1st Ed.), 760; *Shoemaker v. Benedict*, 11 N. Y. 176 (62 Am. Dec. 95); *First National Bank of Utica v. Ballou*, 49 N. Y. 155; *Harper v. Fairley*, 53 N. Y. 442. So that, if this was the only statutory provision in reference to the effect of part payment, the question before us would be of easy solution, for it is not contended that Watson had power or authority to make a new contract or promise on behalf of any of the defendants to this suit.

Our legislature has, however, dispensed with the theory of a new cause of action based upon a new promise, by section 25 of Hill's Code, which declares that "whenever any payment of principal or interest" is made "on an existing contract, whether it be a bill of exchange, promissory note, bond or other evidence of indebtedness," after the same becomes due, "the limitation shall commence from the time the last payment was made." This section, it has been held, refers only to payments made before the statute has run, and fixes by such payment a new date for the running of the statute: *Creighton v. Vincent*, 10 Or. 56. Its effect is to make the fact of such part payment operate as a continuation of the original promise, while, under the rule prevailing elsewhere, the payment is only evidence of a new promise, which, being supported by the original consideration, becomes substantially the basis of a new cause of action: 1 Wood on Limitations, 287. In other words, under the statute, the payment prevents any interruption of the original obligation. It simply fixes the time when the statute commences to run, and does not operate, by means of a new promise, to take a case out of

a statute which is already running at the time the payment is made. At least, this is the effect of the construction put upon the statute by the adjudications of this court, and it has therefore been held that payment by any person liable, directly or in a representative capacity, will keep the debt alive as to all persons liable thereon, whether such payment was made by their authority or not: *Partlow v. Singer*, 2 Or. 307; *Sutherlin v. Roberts*, 4 Or. 378; *Allen v. O'Donald*, 28 Fed. 346. A similar statute was in force in Minnesota from 1864 to 1866, and under it the court held that payment by the principal debtor before the statute of limitations had run against the obligation took the same out of the statute, as against his sureties, although such payment was made without their knowledge or consent: *Whitaker v. Rice*, 9 Minn. 13 (86 Am. Dec. 78). But this doctrine fell with the repeal of the statute upon which it was based: *Willoughby v. Irish*, 35 Minn. 63 (59 Am. Rep. 297, 27 N. W. 379).

It is not believed, however, that, even under this statute, a payment made by a person who is in no way liable to the creditor, and who has no property interest to be protected against the enforcement of the debt, will prevent the running of the statute in favor of the persons liable thereon, or upon whose property it is a charge. Statutes of limitation are no longer based upon a mere presumption of payment arising from the lapse of time, but are now considered as statutes of repose, intended to afford security against stale demands, the benefit of which may be relinquished by the party interested, but ought not to be taken from him without his consent. And, while our statute dispenses with the theory of a new contract or promise, it does not change the rule that a part payment must be made under such circumstances as will amount to a continuation of the original promise. It simply declares the effect of a payment to be the establishment of a

new point of time from which the statute shall run, divested of all the subtleties which have grown up around the subject. But, in order to have that effect, the payment must have been made by some one who is authorized to consent to the continuation of the original liability. Watson was not such a person: he was in no way liable upon the original debt, and had no interest in the mortgaged property at the time the payments were made, and therefore no act of his could be deemed an admission of a continuing liability either on the note or mortgage.

It is claimed, however, that he was entitled to pay the mortgage in order to protect himself against his covenants of warranty; but, if such is the case, his payment would amount only to an admission of a possible liability on the covenants of warranty, and not on the mortgage. Although his covenants of warranty entitled him to compel the mortgagee to accept payment of the mortgage, they would not render such payments effective to toll the statutes, either against the original debtor or his grantees, because he had no power to affect the parties liable by any admission or acknowledgment of his. He never was liable on the mortgage debt, and when he disposed of his interest in the land, all control over it ceased, and he became thereafter a stranger as to the mortgaged premises, and could by no subsequent act of his create, continue, or revive charges thereon. It follows that the decree of the court below must be reversed, and the demurrer to the complaint sustained.

REVERSED.

Decided April 5, 1897.

NESSLEY v. LADD.

(48 Pac. 420.)

30	564
32	524

30	564
40	76

30	564
45	69

30	564
48	48

BILL OF REVIEW--REHEARING--JURISDICTION OF EQUITY.—A motion will not lie in the Supreme Court for a rehearing and for an order opening a decree that has been affirmed on appeal in order that newly discovered evidence may be considered; the remedy being by an original suit to vacate the decree under section 381 of the Code: *Crews v. Richards*, 14 Or. 442, approved and applied.

This case was considered, and the decree of the court below affirmed at the Pendleton term in 1896 (29 Or. 354, 45 Pac. 904), and comes up now on a motion for a rehearing. The particular grounds of the application are stated in the opinion.

MOTION OVERRULED.

For the motion there was a brief over the names of *Baker & Baker*, and *Cox, Cotton, Teal & Minor*.

Contra, there was a brief by *Mr. Thos. H. Crawford*.

Opinion by MR. JUSTICE WOLVERTON.

On the appeal in this case there was an affirmance, and the appellants now move for a rehearing, and that the decree of the court below be set aside, and the cause reopened for the consideration of newly discovered evidence. The motion is supported by affidavits showing, in purport, the evidence relied upon, which it is alleged has been discovered since the decree was affirmed. Prior to the appeal there was a motion filed in the Circuit Court by the same parties for a new trial, based upon alleged newly discovered evidence, but the evidence here relied upon is not the same as there presented. The purpose of the motion, as stated by counsel, is to have this court

reopen the case, and remand it to the lower court with directions to take this new evidence into consideration with that originally submitted, and from the whole to determine the cause ab initio. This is, in effect, what was accomplished under the old equity practice by a bill in the nature of a bill of review, accompanied by a petition to rehear the original cause; and its purpose was to impeach a decree which had not been enrolled, and was always preferred upon leave of the court first had and obtained: *Gibson's Suits in Chancery*, § 1063. The form of such a bill resembled very nearly that of a bill of review, except as to the relief demanded, which was that the cause be heard touching the new matter at the rehearing on the original bill. It stated the former bill and proceedings thereon, the decree, and the point in which the complainant conceived himself to be aggrieved by it, and the new matter discovered upon which he sought to impeach it. There was a plea or traverse, and a trial proceeded regularly upon the issues thus joined: 2 *Daniell's Chancery Pleading and Practice*, *1579-1583. A strong current of authorities holds to the doctrine that where there has been an appeal and a decree by the appellate court, leave must be obtained in that court, or the right to file the bill reserved in its decree. The reasoning upon which the doctrine is maintained is that an inferior court ought not to be permitted to review or revise a decree of a superior court without permission of the latter: *United States v. Knight's Administrator*, 66 U. S. (1 Black), 488; *Southard v. Russell*, 57 U. S. (16 How.) 547; *Stafford v. Bryan*, 2 Paige's Ch. 46; *Kimberly v. Arms*, 40 Fed. 548; *Watson v. Stevens*, 53 Fed. 31 (3 C. C. A. 411); *Franklin Savings Bank v. Taylor*, 53 Fed. 855 (4 C. C. A. 55); *In re Gamewell Fire-Alarm Telegraph Co.*, 73 Fed. 908 (20 C. C. A. 111); *Ryerson v. Eldred*, 18 Mich. 490; *Gale v. Nickerson*, 144 Mass. 415 (11 N. E. 714). The authorities, however, are

not all agreed; and it is maintained by some that the court of chancery has inherent power, without consent of the appellate tribunal, to review its decree on the ground of newly discovered evidence, although passed upon on appeal. See *Putnam v. Clark*, 35 N. J. Eq. 150, and authorities there cited. But, whatever may be the true rule with regard to the forum wherein application therefor should be made, it is always necessary that leave should be first obtained from a tribunal competent to grant it, before a bill of review or a bill in the nature of a review based upon newly discovered evidence can or will be entertained: *Flower v. Lloyd*, L. R., 6 Ch. Div. 297. Thereafter the bill or supplemental bill—its nature depending upon whether the decree has been enrolled or not—is filed as an original proceeding in the court wherein the decree complained of was announced, and is there prosecuted: *Gibson's Suits in Chancery*, § 1060; *Beach on Modern Equity Practice*, § 863; *Dodge v. Northrop*, 85 Mich. 243 (48 N. W. 505). A case is cited from Michigan holding the proper practice to be, where a case is made out for a rehearing upon newly discovered evidence, by petition filed in the Supreme Court, to remand the cause to the court below, with appropriate directions for a rehearing there (*Adams v. Field*, 25 Mich. 18); but we have been unable to find a precedent elsewhere for such practice. In *Russell v. Southard*, 57 U. S. (12 How.) 158, under conditions very similar to the case at bar, Chief Justice TANEY refused a like motion for rehearing. In deciding the motion, he said: "It is very clear that affidavits of newly discovered testimony cannot be received for such a purpose. This court must affirm or reverse upon the case as it appears in the record. We cannot look out of it for testimony to influence the judgment of this court sitting as an appellate tribunal. And, according to the practice of the court of chancery from its earliest history to the

present time, no paper not before the court below can be read on the hearing of an appeal." These are the only cases we find coming near the present question. Both these jurisdictions seem to have retained the common law chancery practice, and the constant exercise of their judicial powers and functions is in accord therewith. The bill of review and the supplementary bill in the nature of review are recognized in both as appropriate and legitimate instrumentalities by which to obtain a modification or impeachment of a decree of the court, and in each the trial in the appellate court is anew, and is confined strictly to the testimony offered in the court below. So it would seem there is no sufficient reason for the divergence in the practice attending a petition for rehearing in the Supreme Court made in the Michigan case, unless it may be accounted for by some chancery rule or statute peculiar to that state.

The decisions of this court are instructive in this connection. In *Day v. Holland*, 15 Or. 464 (15 Pac. 855), it was held that the jurisdiction of this court is appellate and revisory only, and it can exercise no original jurisdiction; that an appeal from a decree does not break it up, and, until annulled or reversed, it is binding upon the parties as to every question directly decided; and that the distinction which had formerly existed between the effect to be given to an appeal and the suing out of a writ of error has been swept away by the enactments of the Code. Under the former chancery practice the appeal suspended the decree of the court below, so that it could not be carried into execution until after the appeal had been disposed of, while a writ of error left the judgment in full force, although, if bail was put in, it operated as a supersedeas; but since the adoption of the Code procedure it would seem that a judgment and decree are alike operative, and stand upon the same footing, until reviewed and

revised upon the appeal, and a stay must be obtained, if at all, by the statutory mode. So that, while, under the Code procedure, in equity, the appeal brings the case here to be tried anew upon the transcript and evidence, the decree of the court below remains in full force and effect, and may be carried into execution unless stayed in the manner provided therefor. Thus the appeal is more nearly assimilated to the writ of error than under the old practice. Again, it has been decided in *Crews v. Richards*, 14 Or. 442 (13 Pac. 97), that under the Code (§ 381, Hill's Code), an original suit, based upon similar grounds to those which were formerly sufficient to found proceedings by a bill of review or a bill of that nature, may now be maintained in equity to impeach, set aside, suspend, or avoid a decree; so that the old procedure by such bills is entirely eliminated from our equity practice, and an original suit substituted by which to accomplish the same purpose. Such a suit may be instituted as a matter of right and without leave, and there appears now no reason why the decree of this court may not be the subject of such attack as well as that of the court below. It is clear that we ought not to adopt a practice so nearly analogous to that which has been specially abolished by statute. A motion for rehearing, based upon newly discovered evidence, might very properly have been entertained by the court below, if filed in season; and, acting by authority of its original jurisdiction, it could have set aside its decree and ordered a new trial. This court, however, in the exercise of its appellate jurisdiction, acts only upon the transcript and the evidence, and it cannot permit its action to be governed or controlled by affidavits touching testimony aliunde. It cannot set aside a decree except by the record. The situation is this: We have affirmed the decree of the court below upon the transcript and evidence, and this determination remains unquestioned by the mo-

tion; but we are asked, in consideration of newly discovered evidence, to vacate the decree of the court below, and direct a rehearing there. It must be conceded that an allowance of the motion would not be in the exercise of strictly revisory powers. But, notwithstanding, if it was necessary, to prevent a failure of justice, to establish such a rule, we would hesitate long before refusing to adopt it or some rule suitable to the purpose; but the plaintiff has an adequate remedy by original suit, and it is wholly unnecessary to provide another. For an analogous holding, see *Flower v. Lloyd*, L. R., 6 Ch. Div. 299, where it was held that leave would not be granted for a rehearing of the appeal before the court of appeal on the ground of the subsequent discovery of facts tending to show that the decree was obtained by fraud practiced upon the court below, for the reason that in such a case the decree could be impeached by original bill. Let an order be entered overruling the motion.

MOTION OVERRULED.

Decided April 5, 1897.

McELVAIN v. BRADSHAW.

(48 Pac. 424.)

30	569
42	570
30	569
45	515

MANDAMUS TO COMPEL SETTLEMENT OF BILL OF EXCEPTIONS—DISCRETION.—Mandamus will not lie to compel a circuit judge to allow a bill of exceptions after failure of the appellant to present the same within the time allowed therefor, where the excuse for the delay is inability to obtain a copy of the official report from the stenographer, and a mistaken belief as to the time allowed for presenting the bill.

DISCRETION OF COURT IN SETTLING BILLS OF EXCEPTIONS.—A trial judge has a wide discretion in the matter of presenting and settling bills of exceptions, and the appellate court will not attempt to control his action by mandamus except under unusual circumstances. The practice in such matters should be liberal, however.

Application by M. E. McElvain against W. L. Bradshaw, Circuit Judge, for a mandamus.

DENIED.

For the plaintiff there was an argument by *Messrs. E. B. Dufur* and *W. H. Wilson*.

For defendant there was an argument by *Messrs. A. A. Jayne*, District Attorney, and *Cicero M. Idleman*, Attorney-General.

Opinion by MR. JUSTICE BEAN.

This is an original proceeding in this court, by mandamus, to compel the judge of the seventh judicial district to settle and sign a bill of exceptions in a criminal action. The facts, as shown by the alternative writ, answer, and accompanying affidavits, so far as material to any question before us, are, in substance, that on October 6, 1896, the petitioner was convicted in the Circuit Court for Sherman County of the crime of forgery, and on the following day sentenced to the penitentiary for the term of two years. During his trial numerous exceptions were taken to the rulings of the court, but they were not reduced to writing at the time, and his counsel asked for and were allowed thirty days after the term in which to prepare and tender a bill of exceptions, but they allowed it to expire without doing so. Thereafter, and on the 1st of December, 1896, what purports to be a bill of exceptions, a copy of which is annexed to and made a part of the petition was tendered to the trial judge, but he refused to settle or allow it, because, as stated in his answer to the alternative writ, "the plaintiff and petitioner herein and his attorneys, and each of them, had been guilty of carelessness, and that the court had no right to excuse such carelessness on the part of the attorneys in reference to the order of the court, as it would destroy the effect and power of the orders of the court, and place a premium on carelessness," and "that the plaintiff and petitioner,

nor his attorneys or either of them, have never applied to or asked this defendant for an extension of the time within which to prepare and present said bill of exceptions, but have carelessly and negligently allowed the time to go by, without preparing or presenting the same, or asking for an extension of time in which to do so, and that this defendant was at all times within the time fixed by said order ready and willing to sign and file a proper bill of exceptions in said case, and was willing upon a proper showing to have extended the time within which said bill of exceptions could have been presented, but the plaintiff and petitioner, and his attorneys and each of them, wholly disregarding said order, carelessly and negligently failed and refused to prepare and present said bill of exceptions within the time fixed by said order, or to ask within said time for an extension of time in which to do so."

It is well settled that mandamus lies in a proper case to compel a trial judge to settle and sign a bill of exceptions, but not to direct him what to put in such bill where there is any controversy as to what it should contain: Elliott on Appellate Court Procedure, § 516; High on Extraordinary Remedies, § 200; 3 Enc. Pl. & Pr. 489; *People v. Anthony*, 129 Ill. 218 (21 N. E. 780); *Jelley v. Roberts*, 50 Ind. 1; *State ex rel. v. Hawes*, 43 Ohio St. 16 (1 N. E. 1). And in *Che Gong v. Stearns*, 16 Or. 219 (17 Pac. 871), it was held that this court, as an incident to and in aid of its appellate authority, had a right to exercise the power in a criminal case, although the bill was not presented or tendered to him within the term at which the trial was had nor within an extension of time allowed for that purpose, and this must be regarded as the settled law of the State. It follows, then, that the only question for our determination is whether the circumstances attending the case at bar call for its exercise, and upon this

question the Stearns case is not in point. That case, as will be observed from the opinion, was heard on a demurrer to the writ, and the question was "whether or not, in any case or under any circumstances, a circuit judge has the power to sign and allow a bill of exceptions" after the time allowed for that purpose, and when it was determined that such power existed, the writ issued as a matter of course. But in the case before us Judge Bradshaw has answered, and says that he refused to sign the bill, not for want of authority, but because, through carelessness and negligence, it was not tendered within the time allowed. Our statute does not prescribe the time in which a bill of exceptions shall be presented for settlement and allowance, and in practice it is permitted after the expiration of the term at which the trial is had; but obviously it should be done whilst the evidence and rulings of the court are fresh within the recollection of the trial court and counsel, and, therefore, it is eminently proper that it be settled either during the term or within some definite time thereafter: 3 Enc. Pl. & Pr. 468. But, while this is so, an order to that effect is not conclusive, but the trial judge may disregard it, and sign the bill after the expiration of the time allowed (3 Enc. Pl. & Pr. 462; *Marye v. Strouse*, 5 Fed. 494; *Coe v. Morgan*, 13 Fed. 844); and if he does so, we will not inquire into the reasons which may have induced the act, but will presume they were sufficient.

The right of a trial court to limit the time for the settlement of a bill of exceptions is indispensable to the orderly administration of the law, and it is entirely proper that the appellant be required to tender his proposed bill within the time fixed, or give a sufficient excuse for not doing so. But, when a reasonable excuse is shown, the trial judge should not hesitate to settle and allow it, notwithstanding the expiration of the time. It would be a very rigorous doctrine to hold that an appellant should

be deprived by circumstances over which he had no control of the benefit of the exceptions taken by him during the progress of a trial. But whether the bill shall be settled and allowed after the time limited is a matter within the sound judicial discretion of the trial judge, the exercise of which cannot be controlled by mandamus, save under circumstances which do not appear in this case. The reasons given by the petitioner for not tendering the bill within the time allowed are, briefly, (1) his alleged inability to obtain from the stenographer a copy of the official report of the trial from which to prepare it; and (2) a mistaken belief that sixty days had been allowed for that purpose, neither of which is sufficient to support the proceeding. The first, no doubt, would have been considered good ground for granting an extension of time, if a proper application had been made therefor; and the second was an error of counsel, which, under the circumstances, would manifestly have justified the trial judge in excusing the default, but it is not sufficient to authorize us to compel him to do so. It is, therefore, believed that we would not be justified in requiring the defendant to settle and sign the bill after his refusal to do so. It follows that the writ must be dismissed, and it is so ordered.

WRIT DENIED.

Argued January 4; decided April 5, 1897; rehearing denied.

GETTY v. AMES.

(48 Pac. 355.)

1. **MECHANIC'S LIEN**—LIENABLE AND NON-LIENABLE ITEMS.—One employed on salary to do such work as may be required, and doing lienable and non-lienable work indiscriminately, is not entitled to a mechanic's lien, since the court cannot undertake from extrinsic evidence to apportion the salary between the lienable and non-lienable items: *Allen v. Elwert*, 29 Or. 444, cited and applied.
2. **SUFFICIENCY OF NOTICE OF LIEN**—CODE, § 3673.—A claim of lien stating that claimants "have, by virtue of a special contract made with A. and T. in the construction of a certain building used as a

30	573
85	71
30	573
438	500

dwelling and barn, constructed and being on the following described land;" * * * "that A. was the owner of the land, and T. had an interest therein, and joined in the contract;" "that the contract and reasonable price of such building" was a certain sum, and a statement of the account was affixed, is clearly insufficient under section 3673 of Hill's Code, because it does not state directly or by necessary inference for whom the labor was done and material furnished, or that claimants had in fact performed any labor upon or furnished any material whatever for the building mentioned: *Dillon v. Hart*, 25 Or. 49, and *Leick v. Beers*, 28 Or. 483, applied.

From Coos: J. C. FULLERTON. Judge.

Suit for the foreclosure of certain mechanics' liens, and from the decree entered plaintiff appeals.

AFFIRMED.

For Christensen & Johnson there was a brief over the names of *D. Lowry Watson*, *Andrew M. Crawford*, and *Watson, Beekman & Watson*, with oral arguments by *Mr. Benjamin B. Beekman* and *Mr. Crawford*.

For R. W. Getty there was a brief and an oral argument by *Mr. J. W. Bennett*.

For Ames and Thibault there was a brief and an oral argument by *Mr. John F. Hall*.

For O'Connell and Flanagan there was a brief and an oral argument by *Mr. J. W. Hamilton*.

Opinion by MR. JUSTICE BEAN.

This is a suit by R. W. Getty to foreclose two alleged mechanics' liens claimed by him upon a building and fence belonging to the defendants Ames and Thibault. The defendants Christensen & Johnson, by their answer, deny the validity of said liens, and set up and seek to foreclose a mechanics' lien of their own upon the same property for labor performed and material furnished. The defendants

O'Connell and Flanagan are mortgage lien claimants, and by their answers controvert the validity of the Christensen & Johnson lien, and also those claimed by the plaintiff, and set up their mortgages, and ask to have them foreclosed in this suit. After issue joined, a trial was had, resulting in a decree declaring the liens of plaintiff and defendants Christensen & Johnson void, and foreclosing the mortgages of O'Connell and Flanagan; and from such decree this appeal is taken.

1. Although an oral argument was made for plaintiff, and a brief filed in his behalf, it is not clear that he has perfected an appeal to this court; but, waiving that point, it is obvious that as to him the decree below must be affirmed. From the evidence it appears that about the 1st of May, 1893, he was hired by the defendants Ames and Thibault for the term of one year at a monthly salary of \$125, to perform such labor and render such services for them as they might from time to time direct, and to furnish a team and carriage. In pursuance of this contract, he immediately entered upon his work, and continued in their service until about the 15th of October, 1893, during which time, at irregular intervals, when not otherwise employed, he worked on a dwelling house and fence his employers were then building, but no separate account was kept of or charge made for the time actually employed in such labor, and the plaintiff's estimate of the value thereof is the merest guess. He was employed by the month to render such services as his employers might require or demand, which it now seems included lienable and non-lienable work indiscriminately. This, however, does not entitle him to a lien for such labor or services as might otherwise come within the provisions of the lien law, for the court cannot undertake from extrinsic evidence to apportion the amount of his monthly salary between the lienable and non-lienable work performed by

him. This question was considered in *Allen v. Elwert*, 29 Or. 444 (44 Pac. 826), and the rule there announced is that "where lienable and non-lienable items are included in one contract for a specific sum, or are made the basis of a lumping charge, so that it cannot be perceived from the contract or account what proportion is chargeable to each, the benefit of the mechanics' lien law is lost. In such cases the court cannot, by extrinsic evidence, apportion the amount of the entire charge or contract price between the lienable and non-lienable items. But where the claimant's demand, made in good faith, consists of several different items, separately charged, some of which are by law a lien upon the property, and others do not come within the scope of the statute, he may enforce his lien so far as given by law, and it is not vitiated because he has included therein non-lienable items." Within this rule, it is clear that plaintiff is not entitled to enforce the liens claimed by him.

2. The only other question to be determined in the case is the sufficiency of the claim of lien filed by the defendants Christensen & Johnson. That portion thereof material to this case is as follows: "Know all men by these presents: That W. O. Christensen and C. A. Johnson, partners as Christensen & Johnson, have by virtue of a special contract heretofore made with Kate F. Ames and Frank Thibault in the construction of a certain building, used as a dwelling and barn, constructed and being upon the following described land, to wit:" Here follows the description of the land. "That Kate F. Ames is the legal owner of said blocks 6 and 7, in Schetter's Addition to Marshfield, Coos County, Oregon, and that Frank Thibault has some interest in said property, and joined with said Kate Ames in the contract for constructing said building. That the contract and reasonable price of such building so constructed was the sum of sixteen hundred

and eighty-three and 66/100 dollars, lawful money of the United States. That the sum of sixteen hundred and eighty-three and 66/100 dollars is now due, said demand and account being hereinafter specifically set forth and stated." Then follows a declaration of the intention to hold the lien upon the building and such convenient space around the same as may be required for its use and occupation, and the statement of account. Within the rule announced by this court in *Rankin v. Malarkey*, 23 Or. 593 (32 Pac. 620); *Dillon v. Hart*, 25 Or. 49 (34 Pac. 817); and *Leick v. Beers*, 28 Or. 483 (43 Pac. 658), this claim or notice of lien is clearly insufficient, because it does not state, either directly or by necessary inference, the name of the person to whom the claimants furnished material, or for whom they performed the labor for which they seek to enforce the lien, or, indeed, that they furnished any material or performed any labor whatever on the building of the defendants. Upon these questions the notice is entirely silent, and is, therefore, insufficient under the mechanics' lien law of this State. It follows that the decree of the court below must be affirmed, and it is so ordered.

AFFIRMED.

Argued January 5: decided April 5, 1897.

SPRECKELS v. BENDER.

(48 Pac. 418.)

BILLS AND NOTES—PRESUMPTION.—The possession of a promissory note and its production on the trial by a prior indorsee raises a presumption which establishes prima facie his legal title to the note, although the same bears an indorsement by him in full to another.

ERASURE OF SUBSEQUENT INDORSEMENTS.—In an action on indorsed notes where plaintiff holder is an intermediate indorser he may strike out his own name and subsequent indorsements, so as to invest himself with the legal title.

EVIDENCE—HARMLESS ERROR.—A letter from an indorsee of a note to his attorney after it had been delivered to the latter for collection explaining an indorsement thereon by him to the payee, is not

admissible for the purpose of showing title to the note in the indorsee, but its admission is harmless where the note itself is produced and shows title in the indorsee.

CONSIDERATION FOR NOTE.—Certain persons agreed to pay to a railroad company certain amounts, in installments, provided the road was completed to a certain point by a day named. The company failed to perform the condition. The subscribers thereupon entered into another agreement with the company, whereby they made their notes for the unpaid subscriptions, and deposited them in escrow, to be delivered to the company if the road were completed by a new date agreed on. *Held*, that the failure of the railroad company to comply with the conditions of the first agreement was taken out of the case by the subsequent contract.

WAIVER OF OBJECTION.—An objection must be taken and the ground thereof stated when the testimony is offered or the point will be considered waived.

From Coos: J. C. FULLERTON, Judge.

Action to recover the amount of three certain notes given to aid a railroad subsidy, and transferred to plaintiff. Defendant appeals from a judgment against him.

AFFIRMED.

For appellant there was a brief over the names of *G. W. Short, Wm. R. Willis, Andrew M. Crawford*, and *Watson, Beekman & Watson*, with an oral argument by *Messrs. Crawford and Willis*.

For respondent there was a brief over the names of *J. W. Hamilton* and *John A. Gray*, with an oral argument by *Mr. Hamilton*.

Opinion by MR. JUSTICE WOLVERTON.

This is an action by the J. D. Spreckels & Bros. Company to recover on three promissory notes executed by Edward Bender, and made payable to the Coos Bay, Roseburg & Eastern Railroad & Navigation Company or order. The circumstances attending and which induced their execution are as follows: In May, 1890, the defendant, with others, executed a certain subsidy agreement.

whereby he agreed to pay the said railroad company \$1,250, in installments, as certain definite portions of a railroad were constructed eastward from Marshfield, the last payment to be made when it was completed to Myrtle Point. There was a stipulation that the road should be completed to Myrtle Point May 1, 1891, and to Roseburg December 31, 1891, and that the company should maintain a depot within the corporate limits of the former place. The road not having been completed as required by the subsidy agreement, the subscribers thereto, including the defendant, on March 21, 1893, entered into another agreement with the company, whereby, after reciting that the subscribers had given their notes for their respective unpaid subscriptions (although the notes in question were not in fact signed until April 27, 1893), it was agreed that the company and the makers of such notes should elect a trustee, with whom the notes should be deposited, and delivered by him to the company when it completed its road to Myrtle Point, established depot grounds, and had cars running thereto, provided these conditions were performed by the company on or before September 15, 1893; otherwise to be returned to the makers. The notes in question were delivered to one Dodge, who had been elected the trustee in pursuance of the agreement. After the completion of the road to Myrtle Point, and the establishment of a depot at that place, prior to September 15, 1893, the notes sued on were, with the consent of the defendant, delivered to the railroad company, and were introduced in evidence at the trial, endorsed as follows:

“Pay to the order of J. D. Spreckels Bros. Co.
THE COOS BAY, ROSEBURG & EASTERN RAILROAD & NAV-
IGATION COMPANY.

R. A. Graham, General Manager.”

"Pay to the order of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company.

J. D. SPRECKELS & BROS. COMPANY,
W. W. R. Gibson, Treasurer."

John A. Gray, the attorney for plaintiff, while a witness in its behalf, testified that he had received from plaintiff for collection the notes sued on, and identified a letter written by plaintiff to him from San Francisco, which was offered in evidence with a view of showing for what purpose the notes were sent by plaintiff to its attorney, and was admitted over the objections of defendant. The following is a copy of the letter, viz.: "We have your letter of April 26, stating that you have commenced action against W. A. Borden and E. Bender on the notes. Mr. Graham was carrying out our instructions in giving you the notes. We wish you to push the collection of the notes in our name. We had endorsed the notes to the railroad company for collection, they having declined to accept them at their face value as a full transfer in the account for the amounts of the notes." Error is predicated of the introduction of this letter, and of certain instructions of the court, the purport of which appears in the opinion. Judgment was for plaintiff and defendant appeals.

The defendant, by his denials, has put in issue plaintiff's allegation of ownership of these notes, and contends that its endorsement thereon to the railroad company shows prima facie that it is not the owner, but that the railroad company is, and that the letter from plaintiff to its attorney was inadmissible because written by the party in whose behalf it was offered. The defendant's objection to the letter was evidently well taken. It contains matter not germane to the purpose for which the notes were delivered to the attorney, and, not being sent with them.

it cannot be considered as a declaration accompanying the act of such delivery. Proof of plaintiff's declarations as to why and for what purpose it endorsed the notes to the railroad company was undoubtedly inadmissible in its own behalf over the objection of the defendant, but we are of the opinion that the letter did him no harm. It is laid down in *Dugan v. United States*, 16 U. S. (3 Wheat.) 172, as a rule of law, "that if any person who endorses a bill of exchange to another, whether for value or for the purpose of collection, shall come to the possession thereof again, he shall be regarded, unless the contrary appear in evidence, as the bona fide holder and proprietor of such bill, and shall be entitled to recover, notwithstanding there may be on it one or more endorsements in full subsequent to the one to him, without producing any receipt or endorsement back from either of such endorsees, whose names he may strike from the bill, or not, as he may think proper." The reason of the rule may be found in the presumption which accompanies the possession of commercial paper. Where a payee or endorsee of such paper has put it in circulation by an endorsement in blank, the law will presume that whoever is found in possession holds it rightfully, and he may bring an action upon it, and at the trial fill up the blank endorsement with his own name, and thus show a technical legal title in himself. So, also, where commercial paper has been specially endorsed, and is found in the hands of a payee or an intermediate endorser, the law presumes that he has paid the amount of the note to the special endorsee, as it was his duty to do in case of non-payment by the maker or prior endorser at maturity, and by reason thereof has become repossessed of the paper as rightful holder, and he will be permitted at the trial to strike out his own name and all subsequent endorsements, so as to invest himself with the legal title to the paper: *Porter v. Cushman*, 19 Ill. 572; *Bond v. Storrs*, 13 Conn.

411. In *Pilmer v. Bank*, 19 Iowa, 112, a draft was introduced with unerased endorsements similar to those on the notes in suit. The plaintiff was allowed to testify that he had, on the draft being protested, taken it up, and was now the owner of it, of which the appellant complained. DILLON, J., speaking for the court, said: "Being in possession of the draft, the plaintiff prima facie had the right to erase the prior endorsement, and recover as payee, without the evidence now objected to. That the plaintiff produced more evidence than he was bound to do is a matter for which the defendant cannot claim a reversal." There are numerous authorities supporting the rule as laid down in 16 U. S. (3 Wheat.) 172, and, although there are some to the contrary, we believe that case enunciates the better doctrine: See also *Reading v. Beardsley*, 41 Mich. 123 (1 N. W. 565); *Witherell v. Ela*, 42 N. H. 295; *Nevins v. De Grand*, 15 Mass. 435; *Dollefus v. Frosch*, 1 Denio, 367. In the case at bar, plaintiff's possession cast a presumption which established prima facie its legal title to the notes, although its endorsement to the railroad company appeared thereon. It had a perfect right to strike out this endorsement, so as to show a technical title, and the jury might have been instructed to find for plaintiff upon this prima facie title, there being no evidence to rebut it. The letter tended to show only what the possession of the notes proved prima facie, and hence its admission was harmless, as the verdict would have been the same in either event.

Now, as it regards the instructions to the jury: The theory of the defense is that the notes sued on were given in consideration of the contract of May, 1890, and that, the plaintiff having failed to comply with the terms and conditions thereof, the consideration failed, it being contended that the contract of March 21, 1893, did not absolve the plaintiff from performance under that of 1890.

A proper interpretation of the later contract, however, supports neither the theory nor the contention. The existence of the contract of May, 1890, and the fact that certain conditions thereof remained unfulfilled to the letter, undoubtedly constituted the inducement for the later agreement and the execution of the notes. The new contract provides for a deposit of the notes in escrow with a trustee, and they were to become absolute upon the performance of certain conditions imposed thereby, and to be delivered to plaintiff upon such performance. The conditions were complied with, that is to say, the road was completed to Myrtle Point, depot grounds were laid out, and cars were running to that place prior to September 15, 1893; and the trustee, as he was in duty bound to do, delivered the notes to plaintiff, so that the obligation to pay in accordance with their terms became absolute and unconditional. The notes and the later contract completely supplanted the prior subsidy agreement, they left nothing to be performed of its conditions by either party, and it does not now constitute a factor in the present contention, except in so far as it constitutes a consideration for their support. It was, therefore, not error for the court to tell the jury that the question as to whether there was a failure on the part of the railroad company to comply with the conditions of the subsidy agreement was taken out of the case by the subsequent contract. In support of these views, see 1 Rorer on Railroads, 114; *Henderson R. R. Co. v. Moss*, 2 Duvall, 242; *O'Donald v. Evansville, etc., R. R. Co.*, 14 Ind. 259.

There is another objection to the court's statement to the jury "that the notes themselves had been introduced in evidence, and show that there was an endorsement to J. D. Spreckels & Bros. Co., at one time, by Mr. Graham, manager," and the alleged reason for the objection is that there was no proof that such endorsement had been made

by the manager of the railroad company. The record does not show whether this was the case or not, but it does show that the notes and endorsements were introduced in evidence without objection by the defendant upon that ground, and there was no general objection covering it, and, this being so, such proof must be deemed to have been waived.

AFFIRMED.

Argued January 6; decided April 5, 1897.

COOS BAY R. R. CO. v. DIXON.
(48 Pac. 360.)

30 584
48 45

CONSTRUCTION OF CONTRACT—RAILROAD SUBSIDY.—Where a subsidy subscription to a railroad company provided that one installment should be paid when the first ten miles were graded, a second when the rails were laid thereon, a third and fourth, respectively, when the second ten miles were graded, and when the rails were laid, and the balance when the road was finished to a given point, which the company stipulated should be by a specified date, a right of action to recover the first installment accrued when the first ten miles were graded, and was not lost by a subsequent failure to complete the line to the required place within the stipulated time. The completion of the road to the designated terminus and the payment of the last installment were to be concurrent, and must be construed as mutual and dependent covenants; but it is otherwise as to the four prior installments, which are dependent only on the completion of the designated sections of the road: *Coos Bay R. R. Co. v. Nosler*, 30 Or. 547, approved and followed.

From Coos: J. C. FULLERTON, Judge.

Action by the Coos Bay, Roseburg & Eastern Railroad & Navigation Company to recover from W. L. Dixon certain sums by him subscribed toward building the line of plaintiff's road. From a judgment against it, the company appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. J. W. Hamilton*.

For respondent there was a brief and an oral argument by *Mr. S. H. Hazard*.

Opinion by MR. JUSTICE WOLVERTON.

This is an action to recover of defendant the sum of \$1,500 upon a subsidy agreement. The case was tried before the court without the intervention of a jury, and the facts necessary to a determination of the questions involved are stated in its findings. They are as follows, omitting such as do not seem pertinent for an understanding of the situation:

"Second—That on the — day of May, 1890, the defendant entered into a written contract with the plaintiff in words and figures as follows, to wit: 'We, the undersigned, hereby agree to pay to the Coos Bay, Roseburg & Eastern Railroad Company the sums set opposite our names, respectively, to wit: Twenty-five per cent. when the first ten miles of said railroad is graded, commencing at or near Marshfield, Coos County, Oregon, and running eastward towards Roseburg, and via Coquille City and Myrtle Point; twenty per cent. when the rails are laid on the first ten miles; twenty-five per cent. when the second ten miles are graded; twenty per cent. when the rails are laid on the second ten miles; and the balance when the road is completed to Myrtle Point, Oregon. As a consideration for the following subscription, the said railroad company will maintain a depot within the corporate limits of Myrtle Point, Oregon. Said road to be finished to Myrtle Point, Oregon, by January 1, 1891, and to Roseburg by December 31, 1891.' Defendant subscribed said contract, and wrote after his name \$1,500. * * * Third—That on or about the 15th day of July, 1890, the said defendant signed and executed an additional writing, as follows: 'We, the

undersigned, subscribers to the subsidy of the Roseburg & Coos Bay Railroad Company, hereby agree to extend the time of the completion of said road from Coos Bay to Myrtle Point from January 1, 1891, to May 1, 1891. All other conditions of the contract signed by us to remain unchanged.' Fourth—That work in construction of said road was commenced in the month of August, 1890, at Marshfield, and the first ten miles thereof graded about the 1st of February, 1891. Fifth—That the said railroad was graded to Myrtle Point, and the rails laid thereon, in the month of August, 1893, and the road completed to that point at said date. Sixth—That said railroad has not been constructed to Roseburg, and no work has been done on the construction thereof eastward from Myrtle Point. Eighth—That defendant has not paid any part or installment of the amount subscribed." As a conclusion of law, the court found: "That plaintiff was in default in the performance of the contract in the complaint set out at the time this action was commenced, and therefore cannot maintain the action." A judgment of dismissal was entered, and plaintiff appeals.

The agreement which forms the basis of this action is much the same as the one sued on in *Coos Bay R. R. Co. v. Nosler*, 30 Or. 547 (48 Pac. 361), just decided, and the interpretation of each is governed by the same rules. Hence we shall simply make a brief statement of our interpretation of this agreement without a discussion of the rules, and in support thereof we cite the *Nosler* case. Under the agreement in the case at bar, like the *Nosler* agreement, it was no doubt within the contemplation of the parties that payment of the subsidy should and would be made in five installments, and that four of them might become due and payable prior to the completion of the road to Myrtle Point. The completion of the road to Myrtle Point and the payment of the last installment

were to be concurrent events, and are, therefore, to be construed as mutual and dependent covenants; but the agreement to pay the four prior installments must be construed as independent covenants, dependent only upon the plaintiff's completing the designated sections of the road, because by the terms of the agreement the defendant might have been required to pay all of them before the final completion of the road to Myrtle Point. The stipulations of the agreement require the road to be completed to Myrtle Point by May 1, 1891, and to Roseburg December 31, 1891. The time of completion to these points must be regarded as material, because it was so stipulated by the parties from the first, and afterwards so treated as evidenced by the modified agreement. Plaintiff could not recover upon the mutual and dependent covenant, because it failed to complete the road to Myrtle Point within the time named, and was therefore in default. But it had graded the first ten miles of the road prior to May 1, to wit: on or about February 1, 1891, thereby earning twenty-five per cent. of the subsidy, and for this amount its right of action was complete on the day it finished the grade upon the undertaking of the defendant to pay at that time. This right of action continued unabated, notwithstanding the plaintiff afterwards made default in completing the road to Myrtle Point and Roseburg within the time stipulated. Those are conditions subsequent, as respects the right of action for the first installment, and nothing less than a failure of consideration could defeat the action, and this is not insisted upon by the defendant. So that, under the findings of fact, the conclusion of law that the action could not be maintained is erroneous. The plaintiff is, therefore, entitled to recover of defendant the sum of \$375, and legal interest thereon from February 1, 1891. It follows that the judgment must be reversed, and the cause remanded

to the court below with directions to enter judgment for plaintiff, in accordance with this opinion.

REVERSED.

Decided at PENDLETON July 31, 1897.

McKINNON v. COTNER.

(49 Pac. 956.)

30 588
44 443

ENACTMENT OF STATUTES—LEGISLATIVE JOURNALS—PRESUMPTION.—

An enrolled act, signed by the proper officers, and filed in the office of the secretary of state, will be held to have been enacted as enrolled, though the legislative journals show that in its progress through the legislature an amendment was adopted which is not included in the enrolled act, as it will be presumed that the vote by which such amendment was adopted was reconsidered, and the amendment defeated. The rule adopted in this State is that when it appears from the legislative journals that the enrolled act on file with the secretary of state did not receive in either house the number of votes requisite for its passage, the act will be held invalid. This fact, however, must affirmatively be shown; mere silence of the records is not enough: *Currie v. Southern Pacific Co.*, 21 Or. 566, and *State v. Rogers*, 22 Or. 348, cited and applied.

From Union: ROBERT EAKIN, Judge.

Proceeding on execution by J. D. McKinnon against H. C. Cotner and another, defendants, and the American Fire Insurance Company of Philadelphia, garnishee. A demurrer to the answer of the garnishee was sustained, and it appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Willard W. Hindman*.

For respondent there was a brief and an oral argument by *Messrs. John W. Knowles and James D. Slater*.

Opinion by MR. JUSTICE BEAN.

On March 17, 1894, the plaintiff recovered a judgment against the defendant Cotner for the sum of \$93.70, and

under an execution issued thereon the sheriff levied by garnishment upon a sum of money alleged to be due from the American Fire Insurance Company to Frances Cotner under a fire insurance policy covering a dwelling house belonging to her which had been destroyed by fire. The answer of the insurance company to the notice of garnishment being unsatisfactory, the plaintiff procured an order requiring it to appear before the court for examination touching its liability, and thereupon served written allegations and interrogatories, to which the company answered, setting up as a defense (1) that by the terms of the policy no action could be maintained thereon until the assured had made due proof of loss in accordance therewith, and that this provision had neither been complied with nor waived at the time of the service of the garnishee process upon it; and (2) that in any event the amount due or to become due from it to Frances Cotner under the policy in question could not be levied upon under execution, because the property covered thereby was her homestead, and exempt from judicial sale by virtue of the act of the legislature of this State approved February 21, 1893: Laws 1893, p. 93. To this answer a demurrer was submitted and sustained, and, the garnishee refusing to plead further, judgment was rendered against it, from which this appeal is taken.

It will be observed that two questions are presented by this record for decision: First, whether, under an insurance policy conditioned that the company shall not be liable thereon until due proof of loss is made, the company can be charged as garnishee in an action against the policy holder before the required proof has been made or the loss adjusted; and, second, whether what purports to be an act of the legislature of 1893 to exempt homesteads from attachment and judicial sale is a valid law of the State. The consideration of the last question nat-

urally takes precedence over the other, because it is conceded that if the act referred to is a valid law, this proceeding cannot be maintained, and the judgment must be reversed. The contention of the plaintiff is that the enrolled act in the custody of the secretary of state, although appearing upon its face to have been regularly passed by the legislature and approved by the governor, is a nullity, because an amendment to the original act providing that it should not go into effect until January 1, 1894, which appears to have been adopted by the legislature, is not in such enrolled act. The journals of the legislature show that the act in question (designated as House Bill No. 46) was introduced in the house, regularly passed by that body (House Journal, p. 238), and duly transmitted to the senate, where, upon its third reading, on February 16, it was by unanimous consent amended by adding section 8, which provides that the act shall take effect and be in force from and after the 1st day of January, 1894, and, as so amended, was duly passed: Senate Journal, p. 782. The original bill, with the amendment, was then returned to the house, and on the same day the amendment was concurred in by that body, and the bill ordered enrolled: House Journal, p. 928. No further reference to the bill is to be found in the journals of either house, except the entries therein showing that on February 17, 1893, it was duly signed by the presiding officers thereof (House Journal, p. 946; Senate Journal, p. 801), and the enrolled act so signed was approved by the governor, filed in the office of the secretary of state, and published among the laws of the session of 1893, but does not contain section 8. The question here presented is whether this enrolled act, thus authenticated, shall be deemed a nullity because it does not contain the amendment referred to; and this involves the inquiry as to what extent the validity of an enrolled act in the custody of the secretary of state, and

appearing upon its face to have become a law in the manner provided by the constitution, may be impeached by the journals of the legislature. Upon this point there is great conflict in the authorities. One view is that the legislative journals must affirmatively show conformity to the requirements of the constitution in the passage of the bill through its several stages, or else it is not a law. Another view is that the enrolled act, signed by the proper officers and filed in the office of the secretary of state, is to be deemed regularly enacted, and cannot be impeached by reference to the legislative journals. And a third view is that the mere silence of the journals as to matters not required by the constitution to be entered therein will not invalidate a law, but it will be presumed in such case that the enrolled act as filed in the office of the secretary of state, if signed by the presiding officers of the two houses, was regularly passed, but if the journals affirmatively show that in fact it did not pass, the courts will refuse to recognize it as a valid law.

The authorities bearing upon this question will be found collated and arranged by states in a footnote to *Field v. Clark*, 143 U. S. 661 (12 Sup. Ct. 495). The question was before this court in *Currie v. Southern Pacific Co.*, 21 Or. 566 (28 Pac. 884); and *State v. Rogers*, 22 Or. 348 (30 Pac. 74); and the rule there applied is that when it appears from the journals of the legislature that the enrolled act filed in the office of the secretary of state did not in fact receive the requisite number of votes in either house for its passage, the courts will refuse to regard it as a valid law, but the absence of an affirmative showing in the journal to that effect does not affect its validity. In other words, in order to impeach the validity of such an act it must affirmatively appear from the legislative journals that it did not in fact receive the approval of the constitutional number of the members of the legislature.

Mere silence of the journal is not sufficient. Within this rule, we think the act in question must be regarded as valid. It nowhere appears in the journal that it did not pass in the form as actually signed by the presiding officers, and now on file in the office of the secretary of state. It is true, the journals show that in its progress through the legislature an amendment was adopted which is not included in the enrolled act, but the vote by which such amendment was adopted may have been reconsidered, and the amendment defeated. At least, the courts are bound to presume such to have been the case. The enrolled act as filed with the secretary of state is signed by the officers of the house and senate required by the constitution to sign all bills and joint resolutions passed by their respective bodies, and is therefore officially attested in the manner required by the organic law as one that has regularly and duly passed the legislature, and this attestation must prevail, unless the contrary conclusively appears by the journals of their proceedings: *State v. Francis*, 26 Kan. 724. The constitution requires all bills and joint resolutions to be signed by the presiding officers of the respective houses (section 25, article IV), and their signatures must be given full force and effect, and import absolute verity, unless affirmatively contradicted by the journals which the constitution requires to be kept. It follows that in our opinion the homestead law is not invalid for the reason urged in this case, and the judgment of the court below must be reversed, and the cause remanded with directions to overrule the demurrer to the answer of the garnishee.

REVERSED.

Argued March 23; decided April 12, 1897.

JACOBS v. OREN.

(48 Pac. 431.)

1. **APPEAL FROM JUSTICE'S COURT—CORRECTING RECORD.**—The jurisdiction of the Circuit Court on appeal from a Justice's, cannot be defeated by affidavit that the justice, in contravention of his duty, failed to enter in his docket a matter material to the issue; the proper remedy in such case is a nunc pro tunc order from the justice correcting the record.
2. **JUSTIFICATION OF SURETIES ON APPEAL FROM JUSTICE'S COURT.**—In the absence of a demand by the adverse party the sureties on an undertaking on appeal from a Justice's Court need not justify in open court before the judge.
3. **JUSTICE'S COURT—DOCKET ENTRY SHOWING STAY OF PROCEEDINGS.**—The requirement of section 2122, Hill's Code, that a justice of the peace shall make an entry in his docket when an appeal is prosecuted from his decision showing whether or not the proceedings are stayed, is probably intended to be only directory; but whether directory or mandatory, a failure to make such an entry will not be allowed to defeat the appeal, since the omission can be remedied by application to the justice.
4. **APPEAL FROM JUSTICE'S COURT—TIME FOR FILING TRANSCRIPT.**—The transcript on appeal from a justice of the peace may be filed with the clerk of the Circuit Court at once after the appeal has been allowed: *Hughes v. Clemens*, 28 Or. 440, followed.
5. **NEW TRIAL—SETTING ASIDE A VERDICT.**—Where defendant admitted that he owed part of the sum demanded, the judge very properly set aside a verdict in his favor, and granted a new trial.
6. **PLEADING TENDER—COSTS.**—A defendant desiring to avoid the payment of costs by virtue of a tender under section 561 of Hill's Code, must allege that before the commencement of the action he tendered to plaintiff an amount in satisfaction of his demand, and now brings the same into court and deposits it for plaintiff.
7. **COSTS—PROOF OF TENDER.**—Where defendant alleged a tender and deposit in court of that part of the amount admitted to be due, a verdict in favor of plaintiff for that sum does not of itself show that the allegations of tender and deposit were found to be true, so as to entitle defendant to recover his costs, without a special finding to that effect.

From Benton: J. C. FULLERTON, Judge.

Action by A. Jacobs against Levi Oren, in Justice's Court. On appeal to the Circuit Court, plaintiff recovered

30	593
37	212
30	598
39	158

30	593
448	375

judgment for a part of the amount claimed, together with his costs and disbursements, and defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Walter S. Hufford, F. M. Johnson and E. E. Wilson*, with an oral argument by *Mr. Hufford*.

For respondent there was a brief and an oral argument by *Messrs. J. Fred Yates and A. L. McFadden*.

Opinion by MR. CHIEF JUSTICE MOORE.

This action was commenced in a Justice's Court of Benton County to recover the sum of \$15, alleged to be due on account of the rent of certain premises leased by the plaintiff to the defendant. The answer denies any indebtedness on said account greater than the sum of \$2.50, which amount it is alleged was tendered plaintiff before the commencement of the action. A reply having put in issue the allegations of new matter contained in the answer, a trial was had, resulting in a verdict and judgment in favor of the defendant, from which the plaintiff appealed. In the Circuit Court the defendant moved to dismiss the appeal, assigning as a reason therefor, *inter alia*, that the transcript failed to show that he tendered in open court the amount admitted to be due plaintiff; but, this motion being overruled, a trial was had, resulting in a verdict for the defendant, whereupon counsel for plaintiff moved the court for a judgment for the sum of \$2.50 non obstante verdicto, and for the costs and disbursements of the action. The court overruled this motion, but set the verdict aside, and granted a new trial. Thereafter the defendant was permitted to amend his answer by inserting, after the allegation of tender, the words, "and now brings the same into court"; and, this matter being put

in issue by the reply, another trial was had, resulting in a verdict for plaintiff in the sum of \$2.50, whereupon defendant's counsel, based upon their client's affidavit, which showed that he had deposited with the justice who tried the action the sum of \$2.50, moved the court for a judgment for his costs and disbursements, which motion being overruled, a judgment was given on the verdict and in favor of the plaintiff for \$2.50, and the costs and disbursements, from which the defendant appeals.

1. It is contended by counsel for the defendant that the transcript from the Justice's Court is fatally defective, in that it fails to recite that the defendant, upon filing his answer, deposited in that court the amount of money tendered the plaintiff; and that, such being the case, the court erred in its refusal to dismiss the appeal. It was incumbent upon the plaintiff to file with the clerk of the Circuit Court a transcript containing a copy of the material entries in the justice's docket relating to the cause on appeal (Hill's Code, § 2125); and it must be presumed that this duty was fully performed, as the justice's certificate to the transcript states, in effect, that it contains a copy of every docket entry made by him in the action. If he had omitted any entry made in his docket, which the trial court might have considered material to the cause on appeal, the defendant, by suggesting a diminution of the record, could have obtained a rule on the justice requiring him to complete the transcript by adding a copy of such entry thereto: 2 Enc. Pl. & Pr. 305; Elliott's Appellate Court Procedure, § 217. The defendant does not claim, however, that any docket entry was omitted from the transcript, but that the justice, neglecting to comply with the requirements of subdivision 13 of section 2055, Hill's Code, to the effect that he shall enter in his docket all matters which may be material, failed to make an entry therein showing the alleged deposit in his court. If the

affidavit relied upon to show such neglect be sufficient to defeat the apparent jurisdiction of the Circuit Court, it must be admitted that the perfecting of an appeal from a Justice's Court would be a difficult matter, and jurisdiction would be made to depend upon the showing made by the affidavits of the respective parties that the justice either did or did not enter in his docket all matters material to the issue. The method of obtaining jurisdiction on appeal has been prescribed by statute, and, when complied with, the fact is ascertainable from an inspection of the record in the appellate court, and hence jurisdiction cannot be conferred or defeated by the affidavits of the parties. If the defendant was injured by the failure of the justice to make the proper entries in his docket, he had a remedy by applying to that court to correct and amend the record made therein: Elliott's Appellate Court Procedure, § 206. A nunc pro tunc order, upon proper notice to the adverse party, could have been obtained and entered, thereby correcting the record; and the right to make this correction could not be denied because the action had been transferred to the Circuit Court, since the justice would be merely putting upon record the evidence of an order which had theretofore been duly made, and, when certified by him to the Circuit Court, the transcript would then be complete.

2. It is also claimed that the transcript is defective because it fails to show that the sureties in the undertaking on appeal justified, and that the justice failed to make an entry in his docket to the effect that the proceedings were thereby stayed. The justice is required to enter in his docket a memorandum of the undertaking and the justification of the sureties therein (subd. 10, § 2055, Hill's Code); but, since the sureties in such an undertaking are not obliged to justify unless so required by the adverse party (Id., § 2123), it is evident that, in the

absence of such a request, there need be no justification nor entry concerning it.

3. The justice is also required to state whether or not the proceedings are stayed by the appeal: Code, § 2122. This the transcript fails to show, but we think the requirement is directory only, and intended merely to furnish a foundation for the recall of an execution which may have been issued; but, however this may be, any failure of the justice in this respect could have been corrected in the manner hereinbefore indicated, and ought not to defeat an appeal taken in the manner prescribed by law.

4. It is claimed that the justice made out and delivered the transcript to the plaintiff on the day the appeal was allowed, thereby depriving the defendant of his right to except to the sureties in the undertaking, and that, this being so, the appeal was prematurely taken, in which case the Circuit Court failed to acquire jurisdiction. This question has already been decided adversely to defendant's contention, this court holding in a late case that the transcript might be filed with the clerk of the Circuit Court immediately after the appeal has been allowed by the justice: *Hughes v. Clemens*, 28 Or. 440 (42 Pac. 617).

5. It is next contended that the court erred in setting aside, on its own motion, the verdict rendered at the first trial. It will be remembered that the answer admitted that there was due and had been tendered the plaintiff the sum of \$2.50, but it did not show that the tender had been kept good by alleging a deposit in court, as was required by the statute: Hill's Code, § 561; *Holladay v. Holladay*, 13 Or. 523 (11 Pac. 260). "The tender," says Woods, J., in *Storwell v. Read*, 41 Am. Dec. 714, "does not discharge the debt, for an action lies as well after the tender as before to enforce the payment of it; and the creditor cannot maintain trover for the money that has been tendered and not accepted. On the contrary,

the debtor may, from the moment it is refused, appropriate it to his own use. Indeed, the only effect of a tender is to enable the debtor who has made it, and keeps it ready for the creditor, to escape the payment of the costs of any action that may be commenced to recover the debt, by showing that he has done, and is ready to do, all that is in his power to perform his contract, and that, although the debt is not paid, it is no fault of his." Upon the admission in the answer, it was incumbent upon the court to instruct the jury that they should find for the plaintiff in the amount so conceded to be due—and it must be presumed, in the absence of any showing to the contrary, that this duty was fully performed (Hill's Code, § 776, subd. 15)—notwithstanding which they found for the defendant, clearly contrary to such instructions, in view of which the court very properly set aside the verdict, and granted a new trial: 16 Am. & Eng. Enc. Law (1st Ed.), 552; *Friendly v. Lee*, 20 Or. 202 (25 Pac. 396).

6. It is also insisted that the record discloses that the defendant, after having tendered the amount acknowledged by him to be due, deposited the same with the justice, and, the verdict being for the amount so deposited, he was entitled to a judgment for his costs and disbursements. A defendant desiring to avoid the payment of costs must allege that before the commencement of the action he tendered to the plaintiff an amount in satisfaction thereof, and now brings the same into court and deposits it for plaintiff: Hill's Code, § 561.

7. The defendant did not allege in the Justice's Court that he made this deposit, nor in the Circuit Court until the second trial of the action; but, assuming, without deciding, that he had a right to so amend his answer in the latter court, what is there in the record to show that such allegation of tender was found to be true? It must be admitted that the verdict was for the amount claimed

to have been deposited, but the jury may have reached the conclusion that that amount was due the plaintiff from the admission in the answer, and not from any proof of a tender or deposit in court. The defendant could have obtained a special finding by the jury upon this question—and thus show his right to exemption from the payment of costs (Hill's Code, § 561); but, having failed to do so, there is nothing in the record to show that the allegations of tender were found to be true. There being no error in the record, the judgment is affirmed.

AFFIRMED.

Argued April 20; decided May 1, 1897.

BRODERS v. BOHANNON.

(48 Pac. 692.)

LANDLORD AND TENANT—CHATTEL MORTGAGE ON CROP—FARM LEASE.—Under a lease stipulating that the crops raised on the demised premises shall be and remain the property of the landlord till the rent is fully paid, the title to the crops does not vest in the tenant till he has paid the rent (*Fox v. McKinney*, 9 Or. 493, approved and followed), and the effect of such a provision is not to make the instrument a mortgage which must be filed to give it validity against subsequent mortgagees and purchasers in good faith. Under such circumstances, a chattel mortgage on the growing crops does not take precedence over the landlord's claim for rent, though the lease be unrecorded.

From Linn: H. H. HEWITT, Judge.

Action by H. Broders against J. C. Bohannon and others to foreclose a chattel mortgage. From a decree in favor of defendants, plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the name of *Weatherford & Wyatt*, with an oral argument by *Mr. James K. Weatherford*.

For respondents there was a brief over the name of

Blackburn & Somers, with an oral argument by *Mr. John M. Somers*.

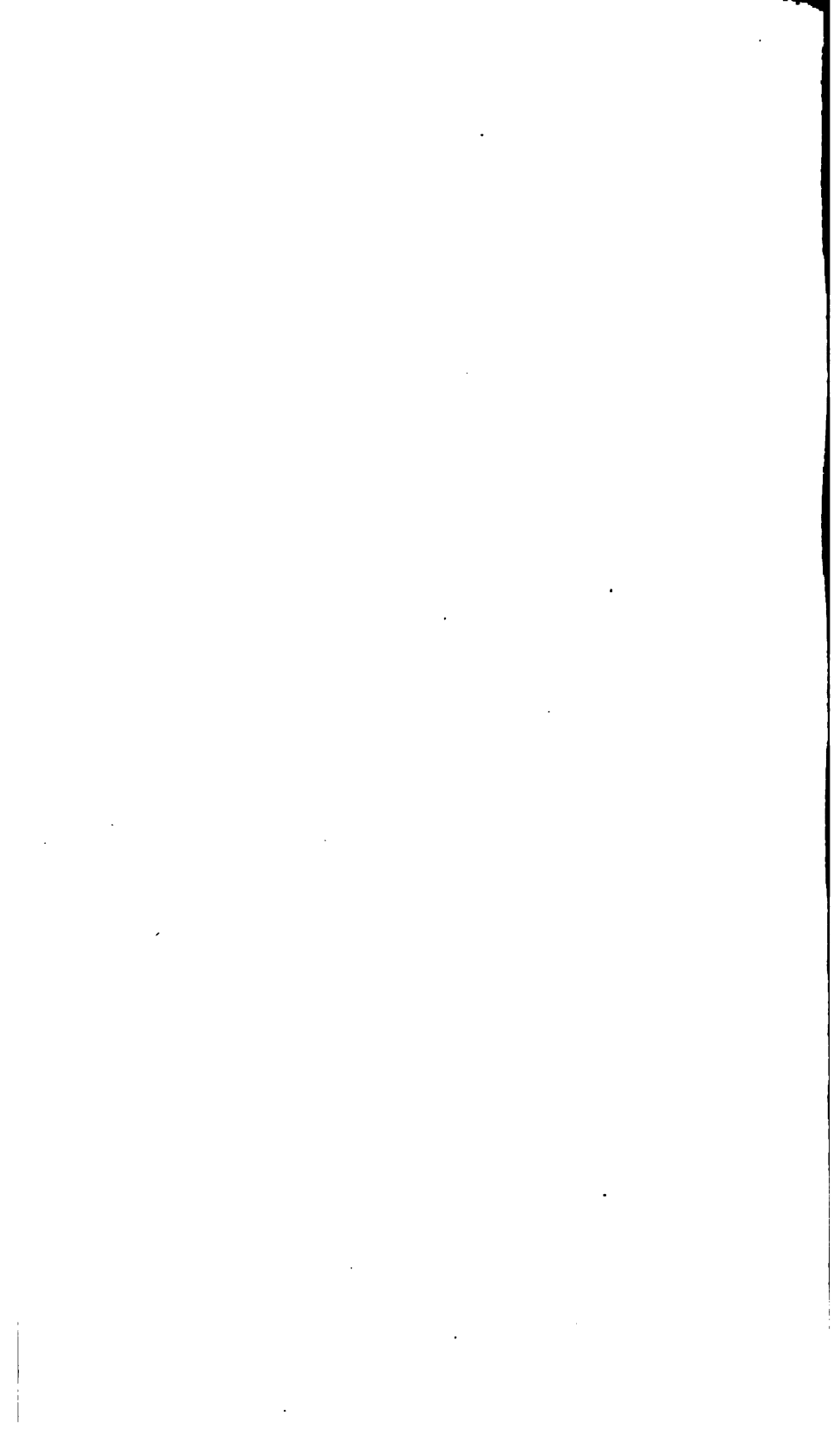
Opinion by MR. JUSTICE BEAN.

This controversy arises out of the following facts: In November, 1892, the defendant Bohannon leased a certain farm in Linn County for the term of two years, at a rental of \$1,200, payable one-half on or before October 1, 1893, and the remainder on or before October 1, 1894. By the terms of the lease under which he held, it was stipulated "that all crops, of whatsoever nature, raised on said premises each year should remain and be the property of the party of the first part (landlord) until the rents, as above specified, are fully paid to the said first party." In September, 1893, and while Bohannon was in possession of the property, the plaintiff, Broders, without knowledge of the stipulations contained in the lease, loaned him the sum of \$438.85, and as security therefor took a chattel mortgage on all the grain of every kind then sown and growing on the leased premises, as well as that to be sown thereon during the current and ensuing year. Bohannon farmed the land during the year 1894, but failed to pay either the rent due under the lease for that year, or his indebtedness to plaintiff, and the single question to be decided in this case is whether the mortgage takes precedence over the landlord's claim for rent. The contention for the mortgagee is that the effect of the stipulation in the lease that the crops raised on the premises should remain and be the property of the landlord until the rent should be fully paid is to make that instrument a mortgage in his favor to secure the payment of the rent, and as such it is void as to subsequent mortgagees and purchasers in good faith, because not recorded. The question was decided adverse-

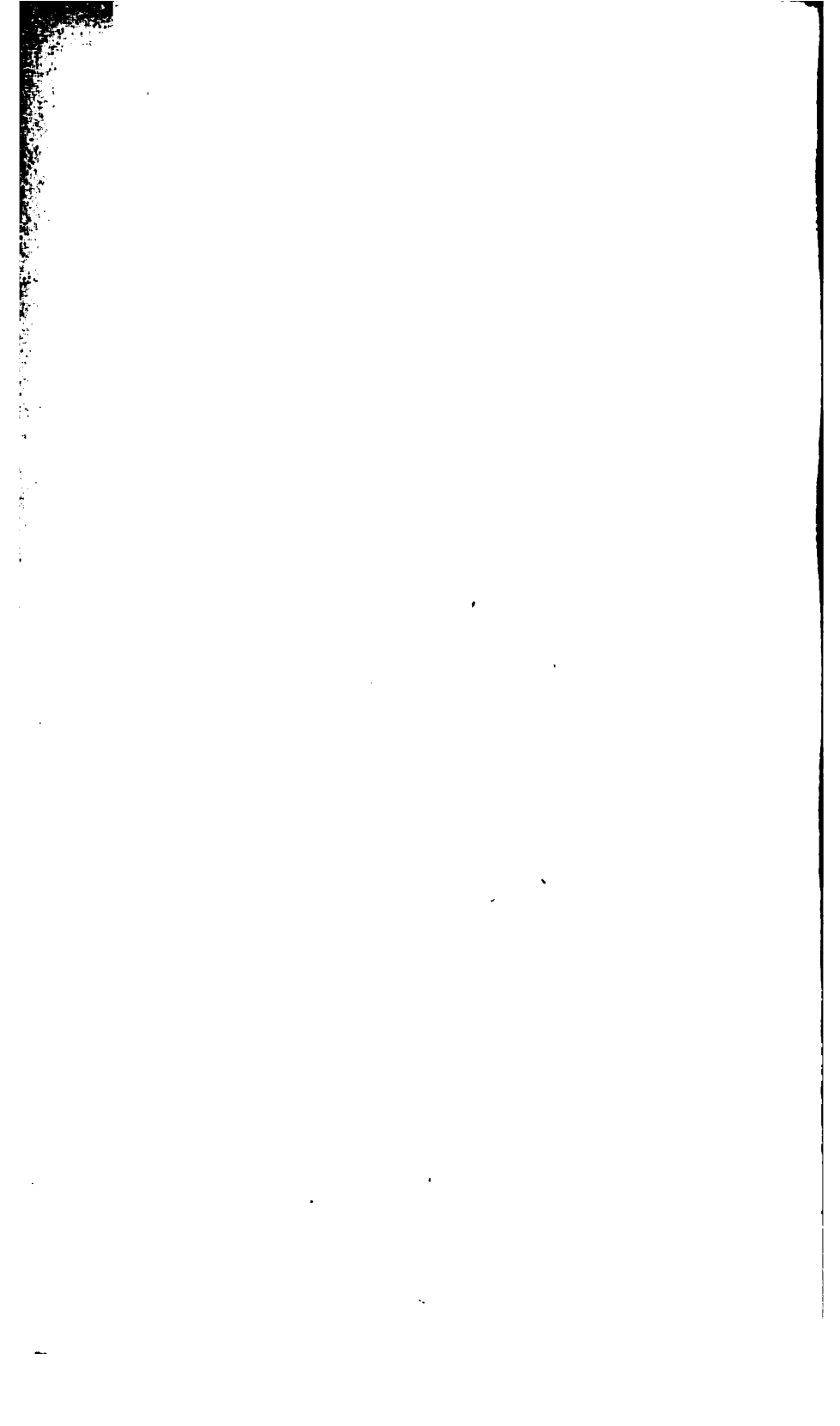
ly to plaintiff's contention in *Fox v. McKinney*, 9 Or. 493. In that case a similar provision in the lease was before the court for construction, and it was held that under it the title to the crop did not vest in the tenant until the payment of the rent, and, this being so, it necessarily follows that he could not, prior to that time, encumber it by mortgage or otherwise so as to interfere with the landlord's rights under the lease. So far as we can see, there is no substantial difference between the provisions of the lease in the case at bar and in the one referred to, which must therefore control and govern in the determination of the question presented by this appeal. It follows that the decree of the court below must be affirmed, and it is so ordered.

AFFIRMED.

Mr. Justice WOLVERTON took no part in this decision.



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AGENTS AND AGENCY.**PRESUMPTION AS TO SCOPE OF AGENCY.**

1. The presumption is that an agency comprehends the doing of only lawful things, and the law will always assume that an illegal act, as, for example, accepting usury, was done without the principal's authority or consent.—*Barger v. Taylor*, 228.

DECLARATION OF AGENT—RES GESTAE.

2. Where the acts of an agent are binding on the principal, what was said by the agent at the time is admissible as part of the res gestae; but where the declarations do not accompany the act, they are not admissible to charge the principal.—*First National Bank v. Linn County Bank*, 296.

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1. An appeal from a conviction of a crime abates on the death of the defendant, and it cannot be prosecuted to a final determination by the personal representatives of the accused, even though the abatement leaves in force a judgment for costs, enforceable against his estate.—*State v. Martin*, 108.

PRESUMPTION FROM FAILURE TO APPEAL.

2. A party who does not appeal from a judgment or decree is presumably satisfied, and his interests will not be considered by the reviewing authority.—*Cooper v. Thomason*, 162.

EXCESSIVE DAMAGES—SPECIFICATION OF ERROR.

3. The question of excessive damages cannot be raised on appeal unless specified as a ground of error in the notice of appeal.—*Osmun v. Winters*, 178.

APPEAL—CONTINUED.

USURY—WHO IS AN "ADVERSE PARTY."

4. The word "party," as used in section 537 of Hill's Code, providing that a notice of appeal must be served on every "adverse party," means only one who becomes identified with the case in some mode recognized by law, so as to be bound by the proceeding. Within the scope of this rule, the fact that a contract has been by the trial court adjudged usurious, and the principal sum declared forfeited to the state for the use of the school fund, does not make the state a "party" to the proceeding so as to require notice of appeal to be served on it.—*Barger v. Taylor*, 228.

WHO MUST BE SERVED WITH NOTICE OF APPEAL.

5. The state is not an "adverse party" in the sense that it must be served with a notice of appeal from a judgment or decree in its favor upon consideration of a contract found to be usurious. It is not obliged to intervene in order to obtain the benefit of the forfeiture provided by section 3589, in cases of usury, and unless it has been made a party to the proceeding in some appropriate manner, it is not a "party" to the litigation at all.—*Barger v. Taylor*, 228.

6. In a suit against a county and its treasurer and sheriff to restrain the levy of a tax to meet the payment of certain county warrants which are claimed to have been illegally issued, the county is an adverse party so as to require it to be served with the notice of appeal by the other defendants from a decree granting the injunction, for if the decree be modified or reversed, its liability to pay will certainly be affected.—*Stuller v. Baker County*, 294.

SUFFICIENCY OF NOTICE—DESCRIPTION OF JUDGMENT.

7. A notice of appeal to the Supreme Court describing the judgment as rendered March 2, 1896, for "the sum of \$250 and interest, from May 8, 1894, amounting to the sum of — dollars," is insufficient to support an appeal from a judgment rendered March 3, 1896, for \$293 and interest thereon from that date at the rate of ten per cent. per annum.—*Duffy v. McMahon*, 306.

DEFAULT JUDGMENT—SUFFICIENCY OF COMPLAINT.

8. On an appeal from a judgment for want of an answer, the sufficiency of the complaint cannot be questioned.—*Weaver v. Southern Oregon Company*, 348.

CONCLUSIVENESS OF FINDINGS ON APPEAL.

9. A finding of fact by a trial court in a law action will not be disturbed on appeal if there is any evidence to support it.—*Liebe v. Nicolai*, 364.

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10. Where a demurrer to a part of an answer has been overruled, and the parties have gone to trial, an appeal by defendant from a judgment against him does not bring to the appellate court the question of the sufficiency of the answer.—*Holman v. DeLin*, 428.

APPEAL FROM JOINT AND SEVERAL JUDGMENT.

11. Any one of several defendants against whom a joint and several judgment has been rendered may appeal therefrom, even though

APPEAL—CONTINUED.

he be one of a co-partnership, and the firm does not appeal.—*Cor v. Alexander*, 438.

UNDERTAKING FOR COSTS ON APPEAL.

12. Under a bond "to pay all costs and disbursements that may be awarded against them on * * * appeal," given to perfect an appeal from an inferior court to the Circuit Court, the sureties are not liable for any expenses incurred by a further appeal to the Supreme Court.—*In re John's Will*, 495.

APPEAL TO SUPREME COURT—FILING TRANSCRIPT.

13. Where the parties stipulate that a printed abstract shall be filed in lieu of the usual transcript on appeal (rules 4 and 13, Rules of Supreme Court, 24 Or. pp. 595, 601), one of them cannot afterwards object that the court has no jurisdiction, under section 541, Hill's Code, providing that the jurisdiction of the appellate court shall attach only on filing the transcript.—*Frat v. Wilson*, 542.

APPEAL TO CIRCUIT COURT—FILING TRANSCRIPT.

14. The transcript on appeal from a justice of the peace may be filed with the clerk of the Circuit Court at once after the appeal has been allowed.—*Jacobs v. Oren*, 593.

DISCRETION OF COURT IN SETTLING BILLS OF EXCEPTIONS.

15. A trial judge has a wide discretion in the matter of presenting and settling bills of exceptions, and the appellate court will not attempt to control his action by mandamus except under unusual circumstances. The practice in such matters should be liberal, however.—*McElvain v. Bradshaw*, 569.

APPEAL FROM JUSTICE'S COURT—CORRECTING RECORD.

16. The jurisdiction of the Circuit Court on appeal from a Justice's, cannot be defeated by affidavit that the justice, in contravention of his duty, failed to enter in his docket a matter material to the issue; the proper remedy in such case is a nunc pro tunc order from the justice correcting the record.—*Jacobs v. Oren*, 593.

JUSTIFICATION OF SURETIES ON APPEAL FROM JUSTICE'S COURT.

17. In the absence of a demand by the adverse party, the sureties on an undertaking on appeal from a Justice's Court need not justify in open court before the judge.—*Jacobs v. Oren*, 593.

JUSTICE'S DOCKET SHOWING STAY OF PROCEEDINGS.

18. The requirement of section 2122, Hill's Code, that a justice of the peace shall make an entry in his docket when an appeal is prosecuted from his decision showing whether or not the proceedings are stayed, is probably intended to be only directory; but whether directory or mandatory, a failure to make such an entry will not be allowed to defeat the appeal, since the omission can be remedied by application to the justice.—*Jacobs v. Oren*, 593.

RECORD SHOWING ONLY PART OF EVIDENCE.

19. Alleged error in overruling a motion for a new trial on the ground that the verdict was against law will not be considered by the Supreme Court, where the bill of exceptions does not contain or pur-

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port to contain all the evidence given on the trial or all the instructions of the court.—*First National Bank v. Linn County Bank*, 296.

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1. Section 3173 of Hill's Code, declaring that no general assignment by an insolvent for his creditors shall be valid unless made for the benefit of all the creditors, is intended to entirely destroy all such assignments with preferences, but its operation is confined to general assignments, and it does not limit or affect the right of a failing or insolvent debtor to pay or secure certain creditors with part of or all his property.—*Inman v. Sprague*, 321.

FRAUDULENT CONVEYANCES—PREFERENCES IN ASSIGNMENTS.

2. In cases where several conveyances are executed about the same time, and it is sought to have them considered together as forming a general assignment, the guiding principle is the actual intention of the parties; and if the instrument which is claimed to create an illegal preference was given and received in good faith, to secure or pay a genuine debt, and not as a part of an attempt to evade the prohibition against preferences, it will be sustained, however near in point of time it may be to a subsequently executed general assignment.—*Inman v. Sprague*, 321.

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ATTACHMENT.**ATTACHMENT VOID FOR FRAUD.**

1. Where an attachment action is intentionally brought on a false claim, or on a claim that is known to be partly false, the whole proceeding will be held void as against subsequent attaching creditors; though this may not be true where the just and false are inadvertently blended in one claim.—*Craig v. California Vineyard Company*, 43.

RIGHT OF ATTACHING CREDITOR TO ATTACK CONVEYANCE.

2. Before an officer who is holding attached property that is claimed by a stranger can justify his possession on the ground that he is the agent of the attaching creditors, he must show not only his writ but also that the plaintiffs in the writ were actual creditors of the defendant; and, having thus brought his principals into privity with the attached property, he may attack the stranger's title.—*Fisher v. Kelly*, 1.

RIGHT TO QUESTION TITLE TO PROPERTY HELD ON EXECUTION.

3. Where an officer holds under an execution property claimed by a stranger, the writ, when supported by the judgment on which it is issued, is a sufficient lien or title to enable him to question the sufficiency of the stranger's title, and he need not show, as in the case of such property held on attachment, the existence of a debt due from the attached debtor to the attaching creditor.—*Fisher v. Kelly*, 1.

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A motion will not lie in the Supreme Court for a rehearing and for an order opening a decree that has been affirmed on appeal in order that newly discovered evidence may be considered; the remedy being by an original suit to vacate the decree under section 381 of the Code.—*Nessley v. Ladd*, 564.

BILLS AND NOTES.**PROMISE TO CONVEY AS A CONSIDERATION FOR A NOTE.**

1. Where the consideration for a note is an agreement by the payee to perform a certain act, as, to execute to the maker of the note a fee-simple title to certain lands, the courts regard the payment and the conveyance as so far dependent that the failure to make the required transfer is a good defense to an action on the note, where the litigation is between the original parties.—*Sayre v. Mohney*, 238.

BILLS AND NOTES—CONTINUED.

PRESUMPTION AS TO NATURE OF INSTRUMENT.

2. In support of a judgment, an instrument alleged to be a sight draft will be presumed to be an ordinary bank check.—*First National Bank v. Linn County Bank*, 296.

PRESUMPTION OF OWNERSHIP.

3. The possession of a promissory note and its production on the trial by a prior indorsee raises a presumption which establishes prima facie his legal title to the note, although the same bears an indorsement by him in full to another.—*Spreckels v. Bender*, 577.

PRESENTING CHECK.

4. The holder's laches in presenting a check for payment will not discharge the drawer if there were no funds in the bank applicable to its payment, for the latter has suffered no loss by the delay.—*First National Bank v. Linn County Bank*, 296.

EVIDENCE—HARMLESS ERROR.

5. A letter from an indorsee of a note to his attorney after it had been delivered to the latter for collection explaining an indorsement thereon by him to the payee, is not admissible for the purpose of showing title to the note in the indorsee, but its admission is harmless where the note itself is produced and shows title in the indorsee.—*Spreckels v. Bender*, 577.

EVIDENCE OF PAYMENT.

6. While there is a presumption that by giving a promissory note all the antecedent demands existing between the parties have been considered and adjusted, and that the amount expressed is the balance due the payee, yet this is not conclusive between the parties, and it may be shown that when the note was executed an unsettled account existed in favor of the maker against the payee, which it was agreed should be credited on the new note when adjusted, and that the account was afterwards adjusted, and the amount due thereon was larger than the amount of the note. Such testimony would not tend to vary the terms of a written instrument, but would show a payment.—*Williams v. Culver*, 375.

AMOUNT OF ATTORNEY'S FEES—PROVINCE OF JURY.

7. In an action on a note providing for reasonable attorney's fees, in which defendant raises an issue as to the reasonableness of the amount claimed, not only must there be testimony to determine the question, but such testimony must be presented to the jury, and it is their right to determine that as they do other disputed questions of fact, so that the court cannot include in a judgment an allowance for attorney's fees, where the jury did not fix the amount by their verdict. A court cannot thus render a special verdict on one of the disputed issues, while the jury determines the other issues.—*Cox v. Alexander*, 438.

FILLING BLANKS—ALTERATION OF INSTRUMENT.

8. The delivery of a negotiable promissory note with a blank left for the name of the payee or the place of payment confers implied authority upon a bona fide holder thereof to fill in the blanks, without the special consent of the maker; and such additions to a note are not a material alteration of the instrument.—*Cox v. Alexander*, 439.

BILLS AND NOTES—CONCLUDED.

ERASURE OF SUBSEQUENT INDORSEMENTS.

9. In an action on indorsed notes where plaintiff holder is an intermediate indorser he may strike out his own name and subsequent indorsements, so as to invest himself with the legal title.—*Spreckels v. Bender*, 577.

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BOARD OF EQUALIZATION.

Where a complaint is made by a property owner to the board of equalization that his assessment is excessive, the assessment roll as returned by the assessor fixes the value prima facie against both the board and the complainant; and, though the only testimony offered is by the complainant, the board having disagreed with his estimate of values, there is for review only a disputed question of fact, which cannot be tried in such a proceeding.—*Oregon Coal Company v. Coos County*, 308.

BOND FOR DEED.

ESTATE CONVEYED BY AN AGREEMENT TO SELL REAL PROPERTY.

1. At law, a bond for a deed, being in effect and operation a contract for the sale of land, conveys no estate whatever, and such rights as the obligees in such an instrument may thereby acquire are transferable without the formalities of a deed. In equity, however, a bond for a deed is held to transfer the equitable estate, leaving the legal title in the grantor as a security for the payment of the purchase money.—*Sayre v. Mohney*, 238.

RIGHT TO FORFEIT BOND FOR DEED.

2. A vendor in an action at law in Oregon has the right, as between itself and the defaulting purchaser, to declare the contract at an end, and to enforce the provisions as to forfeiture agreed upon.—*Holbrook v. Investment Company*, 259.

BONDS OF PUBLIC OFFICERS. See **OFFICIAL BONDS**.

BREACH OF PROMISE TO MARRY.

EFFECT OF FAILING TO PROVE CHARGES IN ANSWER.

1. On a trial for breach of a marriage promise, an unproved charge of plaintiff's unchastity, made in the answer, may be considered in connection with all the rest of the evidence in aggravation of damages, as tending to show that defendant was actuated by malice.—*Osmun v. Winters*, 178.

2. On a trial for breach of a marriage promise, where no proof of defendant's allegations against the character of plaintiff has been offered, it is not error to charge that, where defendant fails to prove such allegations, "it is a worse case than if there had been a ~~simple~~ denial of the contract of marriage, and the action had proceeded on the simple allegations and denials."—*Osmun v. Winters*, 178.

BREACH OF PROMISE TO MARRY—CONCLUDED.

BREACH OF PROMISE—EVIDENCE.

3. A resolution of a society to which both the plaintiff and defendant in an action for breach of a promise of marriage were members, congratulating them upon their supposed marriage, and directing a copy thereof to be forwarded to them, is admissible in proof of the promise of marriage, since it tends, though remotely, to show a relationship consistent with the plaintiff's claim of an engagement.—*Osmun v. Winters*, 178.

EVIDENCE IN AGGRAVATION OF DAMAGES.

4. On a trial for breach of a marriage promise, an article published over defendant's signature, attacking plaintiff's character, and an insulting letter addressed by defendant to plaintiff, both written after the commencement of the action, are admissible as tending to prove the animus of defendant in refusing to perform the marriage contract, and may be considered in aggravation of damages.—*Osmun v. Winters*, 178.

BRIDGES.

County Bridges Not Subject to Liens. See **MECHANIC'S LIENS**, 2, 3.

BROKERS.

WHEN BROKER HAS EARNED A COMMISSION.

1. To entitle a real estate broker to commissions it must be shown that the broker produced to the seller some one who bought the property, or a purchaser who was ready, able, and willing to buy on the terms proposed, and that such purchaser was rejected.—*Booth v. Moody*, 222.

BROKERS' CONTRACT—COMMISSIONS.

2. Real estate brokers agreed to sell certain lots in consideration of all the proceeds above \$800 an acre. It was also agreed that the price might be paid in installments of \$5 or more a month, the brokers to retain \$10 from the first two installments, and one-half of each installment thereafter till their commissions were paid. Later there was a supplementary agreement that, if any of the purchasers on credit should forfeit their contracts, all forfeited installments paid to the brokers on such sales might be retained as commissions; and, should they effect a resale on credit, all installments thereafter paid were to be divided equally, till the vendor should have received under the new sale \$800 an acre. *Held*, that, where contracts were forfeited for non-payment, unpaid commissions for the original sales were also forfeited.—*Holbrook v. Investment Company*, 259.

CHANGE OF VENUE.

Under section 1222, Hill's Code, authorizing the court to order the place of trial changed when it appears by affidavit that a fair and impartial trial cannot be had, the granting of such order rests in the sound discretion of the trial court, and in this case it does not appear that this discretion was abused to any substantial injury of the accused.—*State v. Pomeroy*, 16.

CHARACTER of Plaintiff in Fire Insurance Case. See **EVIDENCE**, 10.

CHARGE.

Bequests and Devises a Charge on Property. See WILLS, 8.

CHARITABLE TRUST. See CHARITIES, 1-12.

CHARITIES.

PUBLIC SCHOOLS.

1. A gift for the maintenance of free public schools is clearly a gift to a legal charity, and the object and the beneficiaries are as certain as the rules governing charitable trusts require.—*In re John's Will*, 494.

2. The fact that by law provision has been made for the maintenance of public schools in all school districts, without making it, however, compulsory on the district to maintain such schools, does not render invalid a bequest in trust for the maintenance of a public school.—*In re John's Will*, 494.

EQUITY JURISDICTION.

3. Courts of equity in this country, except when prohibited by statute, exercise original inherent jurisdiction over charitable trusts.—*In re John's Will*, 495.

RULE AGAINST PERPETUITIES.

4. A charitable trust is not invalid, as against the rule of perpetuities, because the will provides for the appointment of trustees fifteen years after testator's death, the property in the meantime being given in trust to the executors, for the gift was absolutely and at once to charity, and falls under the exception to the rule.—*In re John's Will*, 495.

SUCCESSION OF TRUSTEES—EQUITY.

5. A charitable trust will not be permitted to fail because the trust may outlive the trustees who are appointed to administer it; for charity is ever a favorite of equity, and a valid trust of that kind will not be suffered to lapse for mere want of a trustee. So, if a donation to charity is immediate and absolute, and a competent trustee is appointed to take, the other conditions being sufficient, a trust arises at once, the property becomes impressed with it, and immediately passes beyond the reach of the heirs or residuary legatees.—*In re John's Will*, 495.

UNCERTAINTY OF TRUSTEES.

6. A charitable trust is not invalid on account of the uncertainty of the trustees, because fifteen years after testator's death, the property in the meantime being given in trust to the executors, the trustees are to be appointed, one each by the incumbent judges of the State Circuit Court and of the Federal District Court, and a third by the two so appointed, and vacancies to be filled by persons appointed by the incumbents of such judgeships.—*In re John's Will*, 495.

POWER TO CHANGE OR MODIFY.

7. Power to formulate rules for the government of the board of trustees of a charity given by will to the persons who are authorized to appoint such trustees can in no way impinge upon, change, or modify the nature of the charity which the testator has sought to

CHARITIES—CONCLUDED.

establish, nor modify the manner of administration wherein he has particularized; nor does this power to formulate rules give supervisory control over the board in the direction of the trust.—*In re John's Will*, 527.

FAILURE OF TRUSTEES.

8. A charitable trust will not fail by reason of the fact that the persons who are authorized to appoint a board of trustees to succeed executors in the management of the property fail to make such appointment, or because the board may not be a body of perpetual succession recognized by the law.—*In re John's Will*, 530.

UNCERTAINTY OF BENEFICIARY.

9. Changes of the boundaries of a school district in which a free school is to be established and maintained by a charitable gift will not affect the validity of the charity which is described as for "children of the school district which shall embrace" a certain town.—*In re John's Will*, 531.

CHARITABLE GIFT A CHARGE ON DEVISED LAND.

10. Failure to provide for conveyance by executors to a board of trustees provided for in a will creating a charity will not prevent the execution of the trust, as the property, even if it descends to heirs of the executor or testator, will be held charged with the trust and equity will place it in the proper channel of administration.—*In re John's Will*, 531.

POWER OF TESTATOR OVER OBJECTS OF CHARITY.

11. A direction that a school or schools should never be used to inculcate the doctrines of any religious sect or denomination, one more than another, may be properly made in a will creating a charitable trust to maintain such school.—*In re John's Will*, 532.

CHATTEL MORTGAGES.

EFFECT OF AGREEMENT NOT TO RECORD.

1. A mere agreement between mortgagor and mortgagee that the mortgage shall not be filed does not render the mortgage fraudulent as to prior creditors of the mortgagor, unless they thereafter deal with the mortgagor as they would not have done had the mortgage been filed.—*Fisher v. Kelly*, 1.

FRAUDULENT SALES BY MORTGAGOR.

2. The fact that, after the execution and delivery of a secret chattel mortgage, the mortgagor continued to dispose of the goods for his own benefit, does not show that the conveyance was fraudulent, unless it further appears that it was done pursuant to an agreement with the mortgagee. In such case the mortgage would be fraudulent in fact as to all creditors of the mortgagor, both those existing when it was made, and those who became so subsequently, under section 3053 of Hill's Code.—*Fisher v. Kelly*, 2.

CHATTEL MORTGAGE ON CROP—FARM LEASE.

3. Under a lease stipulating that the crops raised on the demised premises shall be and remain the property of the landlord till the

CHATTEL MORTGAGES—CONCLUDED.

rent is fully paid, the title to the crops does not vest in the tenant till he has paid the rent, and the effect of such a provision is not to make the instrument a mortgage which must be filed to give it validity against subsequent mortgagees and purchasers in good faith. Under such circumstances, a chattel mortgage on the growing crops does not take precedence over the landlord's claim for rent, though the lease be unrecorded.—*Broders v. Bohannon*, 599.

CHECK.

Instrument Presumed to Be a Check. See **BILLS AND NOTES**, 2.

CIRCUIT COURT. Same as **COURTS**.**CITY.** Same as **MUNICIPAL CORPORATIONS**.**CLAIM AND DELIVERY.** Same as **REPLEVIN**.**CLASS LEGISLATION.**

Statutes Construed and Held to Be of General Application.
See **CONSTITUTIONAL LAW**, 2, 4, 7, 9.

Local and Special Laws for Assessment of Taxes for Road Purposes. See **CONSTITUTIONAL LAW**, 1.

Local and Special Laws for Collecting Township and County Taxes. See **CONSTITUTIONAL LAW**, 3, 4.

Local Laws Regulating Charges and Practice in Courts of Justice. See **CONSTITUTIONAL LAW**, 8, 9.

CODE CITATIONS. Same as **STATUTES OF OREGON**.**COMMISSION**

Of Real Estate Brokers—When Earned. See **BROKERS**.

COMPENSATION

Of Trustee Not Required to Account for Income. See **TRUSTS**, 9.

COMPETENCY

Of Evidence—Breach of Promise. See **EVIDENCE**, 3, 5.

Of Evidence of Co-Conspirator. See **EVIDENCE**, 5.

COMPUTATION OF TIME.

Rule Used for Determining When Statute Has Expired. See **STATUTE OF LIMITATIONS**, 1.

CONDITION.

Specific Performance of Contract to Sell—Waiver of Condition Precedent. See **CONTRACTS**, 7.

Construction of Railroad Subsidy Contract. See **CONTRACTS**, 11, 12.

CONSIDERATION.

Part Performance as Consideration for Option. See **CONTRACTS**, 1.

CONSIDERATION—CONCLUDED.

For Declaration of Trust in Lands—Parol Agreement to Purchase. See **STATUTE OF FRAUDS**, 2.

Promise to Convey Land as a Consideration for a Promissory Note. See **BILLS AND NOTES**, 1.

For Railroad Subsidy—Failure to Complete. See **CONTRACTS**, 11, 12.

CONSPIRATOR.

Competency of Co-Conspirator's Evidence. See **CRIMINAL LAW**, 12.

Declarations of Co-Conspirator. See **CRIMINAL LAW**, 12.

Evidence by Conspirator of Other Crime. See **CRIMINAL LAW**, 13.

CONSTITUTION OF OREGON.

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| | Section 10, Northern Counties Trust v. Sears, 389. |
| Article I. | Section 17, Cox v. Alexander, 444. |
| | Section 25, State v. Martin, 109. |
| | Section 18 |
| | Section 20 Northern Counties Trust v. Sears, 389. |
| | Section 22 |
| Article IV. | Subd. 3, Northern Counties Trust v. Sears, 388. |
| | Subd. 7, Oregon City v. Moore, 215. |
| | Brownfield v. Houser, 534. |
| | Subd. 10 Northern Counties Trust v. Sears, 388. |
| | Section 23 Oregon City v. Moore, 215. |
| Article XV. | Section 1, Baker City v. Murphy, 412. |

CONSTITUTIONAL LAW.

ROAD TAXES—SPECIAL LAW.

1. A provision in a special law giving a common council of a city the exclusive control of all funds collected under general laws for the improvement of roads and streets within such corporation is not in conflict with the State constitution, article IV, § 23, subds. 7 and 10, prohibiting special or local laws "for laying, opening, and working on highways, and for the election or appointment of supervisors," and "for the assessment and collection of taxes for * * * road purposes."—*Oregon City v. Moore*, 215.

SPECIAL AND LOCAL LAWS FOR TAXATION.

2. A statute intended to apply to all the counties of a state, which provides for specified salaries of clerks and sheriffs of all counties in existence when it was introduced in the legislature, and states that these are in lieu of fees previously chargeable, is not rendered special or local, in violation of article IV, § 23, subd. 10, of the State constitution, by failing to provide any salary for those officers in a certain county which was created after the introduction of the bill, but the

CONSTITUTIONAL LAW—CONTINUED.

officers in that county are subject to the law, although their salary is not fixed by it.—*Northern Counties Trust v. Sears*, 388.

3. The act of February 22, 1893 (Laws 1893, p. 163), fixing the compensation of sheriffs, clerks and recorders, is not unconstitutional as in conflict with the State constitution, article IV, § 23, subd. 10, prohibiting local or special laws for the assessment and collection of taxes—assuming but not deciding that the fees provided by that act are taxes, for the act is applicable to every county in the State.—*Northern Counties Trust v. Sears*, 388.

4. The act of 1893, as amended (Laws 1895, p. 77), fixing the compensation of sheriffs, clerks, and other county officers, does not violate article IV, § 23, subd. 10, of the State constitution, prohibiting special or local laws for the assessment and collection of township or county taxes, even if it be conceded that the fees collected by said officials are taxes.—*Brownfield v. Houser*, 534.

TITLE OF AMENDATORY ACT.

5. Independent acts, designed to accomplish distinct purposes, standing alone and depending on the force of their own provisions to accomplish the desired objects, are not obnoxious to that clause of the State constitution against amending or revising statutes by mere reference to their titles, though their effect may be to amend or modify by implication laws already in force. Within the scope of this rule, the act of 1893 on the subject of fees and salaries of certain officers (Laws 1893, p. 163), is not in conflict with article IV, § 22, State constitution.—*Northern Counties Trust v. Sears*, 389.

SUBJECT OF ACT.

6. The act of February 22, 1893 (Laws 1893, p. 163), prescribing the compensation of clerks, recorders, and sheriffs, providing for the appointment of deputies, and for the payment of certain sums by litigants, does not violate article IV, § 20, State constitution, to the effect that every act shall embrace but one subject, since all its provisions are germane to and properly connected with the one general subject of compensation of certain officers.—*Northern Counties Trust v. Sears*, 388.

REVENUE BILLS.

7. A constitutional provision that acts for raising revenue must have their origin in the lower branch of the legislature does not apply to a law providing for the exaction of certain fees from parties to legal proceedings, although these are turned into the treasury and the officers paid by salary. Such a law gives to the person who pays the fees something in return other than is enjoyed by the community at large, and which the person may take or not, at his option; these are not acts for raising revenue.—*Northern Counties Trust v. Sears*, 388.

JUSTICE WITHOUT PURCHASE.

8. The constitutional provision that "justice shall be administered openly and without purchase" is not violated by a statute requiring payment of certain moderate fees by parties to legal proceedings, although these are turned into the treasury, and the officers paid by salary.—*Northern Counties Trust v. Sears*, 388.

CONSTITUTIONAL LAW—CONCLUDED.

LOCAL LAWS FOR COURTS OF JUSTICE.

9. The law of February 22, 1893 (Laws 1893, p. 163), providing salaries for certain county officers, and prescribing certain payments to be made by litigants, applies to every county in the State, and thus is not in conflict with article IV, § 23, subd. 3, prohibiting local laws regulating the practice in courts of justice.—*Northern Counties Trust v. Sears*, 388.

TENURE OF OFFICE BY PUBLIC OFFICIALS.

10. Under a constitutional provision that a public officer shall hold his office for a given period, and until his successor is elected and qualified, the term of such a person does not expire until he leaves the office—he continues in office by virtue of the previous election and qualification, and his term is co-extensive with his holding. The same rule applies to persons holding other public official positions under laws containing similar provisions.—*Baker City v. Murphy*, 405.

GENERAL APPLICATION OF STATUTE.

11. The act of February 22, 1893 (Laws 1893, p. 163), which was introduced seven days before, but became a law two days after, the act creating Lincoln County, and which provides that "each of the county clerks of the several counties in this State in which there exists such office shall receive a salary as follows"; that "the sheriffs of the several counties in this State shall receive an annual salary as follows"; that "it shall be the duty of the several clerks of the Circuit and County Courts of this State," etc.—is a general law, the provisions of which the clerk and sheriff of Lincoln County are bound to observe. It is evident from the terms used in the act and from a consideration of the circumstances surrounding its introduction and passage (all which may be considered where the language used is ambiguous or of doubtful import), that this act was intended to be applied to every county in the State.—*Northern Counties Trust v. Sears*, 388.

FORMALITIES IN PASSING BILLS.

12. The rule adopted in this State is that when it appears from the legislative journals that the enrolled act on file with the secretary of state did not receive in either house the number of votes requisite for its passage, the act will be held invalid. This fact, however, must affirmatively be shown; mere silence of the records is not enough.—*McKinnon v. Cotner*, 588.

DUE PROCESS OF LAW.

13. Under the power of eminent domain private property may be taken for public use, but somewhere in the proceeding notice must be given to the owner of the property affected, or the taking will be without "due process of law."—*Grady v. Dundon*, 333.

CONSTRUCTION

Of Railroad Subsidy Contracts. See CONTRACTS, II, 12.

Of Statute Fixing Fees of Certain County Officers. See STATUTORY CONSTRUCTION, I, 2, 3.

CONSTRUCTIVE NOTICE.

Possession of Land as Notice of Legal and Equitable Rights of Possessor. See EQUITY, 2.

CONSTRUCTIVE TRUSTS.

Defined and Distinguished From Other Trusts. See TRUSTS, 3.

CONTRACTS.

CONSIDERATION FOR UNILATERAL CONTRACT.

1. Entering into possession of a mine by an intending purchaser and the expending of money and labor in operating and developing it under the terms of an option to purchase constitute a sufficient consideration to support the option, and render it irrevocable within the time limited for completing the purchase, and it is no objection that the option is unilateral.—*Clarno v. Grayson*, 111.

CONSIDERATION FOR NOTE.

2. Certain persons agreed to pay to a railroad company certain amounts, in installments, provided the road was completed to a certain point by a day named. The company failed to perform the condition. The subscribers thereupon entered into another agreement with the company, whereby they made their notes for the unpaid subscriptions, and deposited them in escrow, to be delivered to the company if the road were completed by a new date agreed on. *Held*, that the failure of the railroad company to comply with the conditions of the first agreement was taken out of the case by the subsequent contract.—*Spreckels v. Bender*, 577.

FAILURE OF CONSIDERATION.

3. The mere failure to complete a railroad within the time specified by a subsidy contract is not such a total failure of consideration as will entitle a subscriber thereto to recover an installment paid in accordance with the contract upon the prosecution of the work to an intermediate point, in the absence of any evidence as to the actual damages sustained.—*Coos Bay Railroad Company v. Nosler*, 547.

REMOTE AND SPECULATIVE DAMAGES.

4. The loss of anticipated profits from the additional value which would have been conferred upon town lots by the construction of a railroad to the town in accordance with a subsidy contract is too remote and speculative to be available as a recoupment or set-off in an action by the company upon the contract.—*Coos Bay Railroad Company v. Nosler*, 547.

TIME AS A NECESSARY ELEMENT IN AN OPTION.

5. It would seem that if a given condition is a prerequisite to the acquirement of a right to the subject-matter of a contract, time ought to be considered of the essence of such a contract, if the performance of the condition is a matter optional with the purchaser, and the contract has been fairly entered into with a view to accord an option only.—*Clarno v. Grayson*, 111.

VERBAL CONTRACT CONCERNING LAND—STATUTE OF FRAUDS.

6. A deed deposited in escrow is insufficient to take an oral contract for the sale of land out of the statute of frauds, unless such deed

CONTRACTS—CONCLUDED.

contains a memorandum of the agreement; nor is payment of the purchase price such a part performance as to overcome the plea of the statute; but taking possession in pursuance of the terms of the contract, and making improvements, is sufficient for that purpose.—*Cooper v. Thomason*, 162.

TENDER—SPECIFIC PERFORMANCE.

7. There are some cases in which a tender of performance is not necessary as preliminary to a suit for specific performance, but they are rare, and the circumstances here were not of that class.—*Clarno v. Grayson*, 111.

CONSTRUCTION OF BOND FOR DEED.

8. At law a bond for a deed is only a contract for the sale of land, and does not convey title, but in equity such a bond transfers the equitable estate, leaving the legal title in the grantor as a security for the payment of the purchase money.—*Sayre v. Mohney*, 238.

9. As between themselves a vendor may enforce against the vendee the terms of forfeiture contained in a bond for a deed, and declare the contract at an end.—*Holbrook v. Investment Company*, 259.

ASSUMPTION OF DEBT BY PURCHASER OF MORTGAGED PREMISES.

10. An agreement by a purchaser of mortgaged premises to assume and pay the incumbrance, and to save the grantor harmless therefrom, is not a contract of indemnity only, but is an absolute undertaking to pay the mortgage debt when due, and if that is not done, there is an immediate right of action, whether the grantor has paid the debt or not.—*Haas v. Dudley*, 355.

SUBSIDY CONTRACT—CONDITION SUBSEQUENT.

11. The liability for the installments stipulated in a railroad subsidy contract to be paid upon the prosecution of the work of construction to intermediate points is not dependent upon the completion of the road to the terminal point within the time stipulated, which is made a condition of the payment of the final installment, but such condition is a condition subsequent so far as concerns all the installments except the last.—*Coos Bay Railroad Company v. Nosler*, 547.

12. Where a subsidy subscription to a railroad company provided that one installment should be paid when the first ten miles were graded, a second when the rails were laid thereon, a third and fourth, respectively, when the second ten miles were graded, and when the rails were laid, and the balance when the road was finished to a given point, which the company stipulated should be by a specified date, a right of action to recover the first installment accrued when the first ten miles were graded, and was not lost by a subsequent failure to complete the line to the required place within the stipulated time. The completion of the road to the designated terminus and the payment of the last installment were to be concurrent, and must be construed as mutual and dependent covenants; but it is otherwise as to the four prior installments, which are dependent only on the completion of the designated sections of the road.—*Coos Bay Railroad Company v. Dixon*, 584.

See also SPECIFIC PERFORMANCE.

See also REFORMATION OF WRITTEN INSTRUMENTS.

CONVEYANCE.

Sufficiency of Description in Tax Deed. See DEEDS, 1.

Estate Conveyed by an Agreement to Sell. See CONTRACTS, 8, 9.

CORPORATIONS.

DIVERSION OF ASSETS—CREDITOR'S BILL.

1. Where corporate assets have been diverted to the payment of private debts, equity will pursue the assets so diverted, and apply them, if recovered, to the payment of the corporate debts, according to their respective priorities.—*Craig v. California Vineyard Company*, 43.

OFFICER'S COMPENSATION.

2. Where an officer of a corporation performs for it services that are outside of his official duties he is entitled to receive their reasonable value, and the doctrine that such an officer acquires no legal claim for services performed in the discharge of his duties unless the compensation therefor was fixed by a resolution or by-law of the board of directors prior to the performance of the service, has no application.—*Mitchell v. Holman*, 280.

SERVICE OF PROCESS ON CORPORATION.

3. Service of summons on one of the principal officers of a private corporation at its principal office or place of business gives the court jurisdiction of the corporation, regardless of whether the officer served resided in or had an office in such county; though, where the service is made on some inferior clerk or agent, the return must show the facts authorizing such substituted service.—*Weaver v. Southern Oregon Company*, 348.

WHO ARE STOCK SUBSCRIBERS.

4. One who has signed a preliminary subscription to the capital stock of a corporation, and has signed the consent agreement for the first meeting of stockholders, and actually participated in such meeting, is a stock subscriber, though he has not signed the stock subscription book after the filing of the articles of incorporation.—*Nickum v. Burckhardt*, 464.

ORGANIZATION—CHANGING OBJECTS.

5. A subscriber to the stock of a corporation cannot avoid liability upon his subscription on the ground that the purposes designated in the articles of incorporation do not correspond with those set forth in the preliminary subscription, where he participated in the organization under such articles.—*Nickum v. Burckhardt*, 465.

ORGANIZATION—NOTICE TO SUBSCRIBERS.

6. Subscribers who were present and participated in the first meeting of the stockholders of a corporation cannot object that the organization was illegal because certain other subscribers, whose presence was not necessary to make up the requisite representation of half the capital stock, were not notified of the meeting as required by law.—*Nickum v. Burckhardt*, 465.

7. One who subscribes to the capital stock of a corporation after its apparent organization cannot avoid liability therefor because certain preliminary subscribers, whose presence was not necessary

CORPORATIONS—CONCLUDED.

to make up one-half the capital stock required to be represented, were not notified of the first meeting of the corporation.—*Nickum v. Burckhardt*, 465.

PRIVITY BETWEEN CORPORATIONS AND STOCKHOLDERS.

8. A stockholder and his corporation are in privity as to an adjudication against the corporation in matters pertaining to duties it owes its members; but when the corporation sues a delinquent member for his stock subscription, it cannot be said to represent any shareholder, so as to bind him by the result, for it is apparent that in such a case the corporation and the stock subscriber are strictly adversary.—*Nickum v. Burckhardt*, 465.

9. A judgment for defendant in an action by a receiver of a corporation against an alleged stock subscriber, involving the sole issue whether or not he was a subscriber at the date of the attempted organization, is not available as an estoppel against the receiver in a subsequent action to recover an unpaid subscription from another alleged stockholder—in other words, the action of the corporation was against the stockholder sued, and not in defense of his rights or interests, and binds only the parties to it.—*Nickum v. Burckhardt*, 465.

CORROBORATION of Accomplice. See CRIMINAL LAW, 11.

COSTS.

TENDER TO AVOID COSTS.

1. A defendant desiring to avoid the payment of costs by virtue of a tender under section 561 of Hill's Code, must allege that before the commencement of the action he tendered to plaintiff an amount in satisfaction of his demand, and now brings the same into court and deposits it for plaintiff.—*Jacobs v. Oren*, 593.

2. Where defendant alleged a tender and deposit in court of that part of the amount admitted to be due, a verdict in favor of plaintiff for that sum does not of itself show that the allegations of tender and deposit were found to be true, so as to entitle defendant to recover his costs, without a special finding to that effect.—*Jacobs v. Oren*, 593.

CHARGEABLE TO WRONGDOER.

3. Where litigation has been caused by the wrongful conduct of a trustee or of one of the parties to a contract, the costs and disbursements ought to be charged against the party at fault.—*Royal v. Royal*, 448.

UNDERTAKING FOR COSTS ON APPEAL.

4. Under a bond "to pay all costs and disbursements that may be awarded against them on * * * appeal," given to perfect an appeal from an inferior court to the Circuit Court, the sureties are not liable for any expenses incurred by a further appeal to the Supreme Court.—*In re John's Will*, 495.

COUNTERCLAIM. Same as SET-OFF.

COUNTY COURTS.

Jurisdiction in Road Matters. See HIGHWAYS, 1, 2.

COUNTY ROADS.

Notice to Property Owner Is Necessary. See HIGHWAYS, 2.

May Be Destroyed by Adverse Possession. See HIGHWAYS, 4.

Sufficiency of Description of Road in Petition. See HIGHWAYS, 5.

Use of Public Money for County Bridges. See HIGHWAYS, 7.

COURTS. See also SUPREME COURT.

RIGHT TO REFER CAUSE—EXAMINATION OF ACCOUNTS.

1. The Circuit Court of Multnomah County, if a case before it involves the examination of long and complicated accounts, may, without the consent of the parties, refer it to a referee; and, where one branch of a case requires twenty-six pages of account for its statement, the reference is justified.—*Craig v. California Vineyard Company*, 43.

EMINENT DOMAIN—QUESTION FOR COURTS.

2. The right of eminent domain is one that can be exercised only by legislative authority, and for a use beneficial to the public, and whether a proposed use is a public one is for the courts to determine as a question of fact.—*Bridal Veil Lumbering Company v. Johnson*, 205.

JURISDICTION OF COUNTY COURT IN OPENING HIGHWAYS.

3. It must now be regarded as firmly settled in Oregon that county courts, while in the exercise of their prescribed powers in the laying out, altering, and vacating of county roads, are courts of limited and inferior jurisdiction, and that every essential jurisdictional fact must affirmatively appear by the record in support of its orders; but, when once it has acquired jurisdiction, the same intendment obtain in favor of the regularity of its proceedings as prevail in courts of general jurisdiction.—*Grady v. Dundon*, 333; *Sime v. Spencer*, 340.

NOTICE FOR ESTABLISHING HIGHWAY.

4. An order of a county court establishing a county road, made without the notice required by section 4063, Hill's Code, is entirely void for lack of jurisdiction.—*Grady v. Dundon*, 333.

LOCAL AND SPECIAL LAWS FOR COURTS OF JUSTICE.

5. The act of February 22, 1893 (Laws 1893, p. 163), fixing the compensation of sheriffs, clerks, and recorders, is not unconstitutional as in conflict with the State constitution, article IV, § 23, subd. 3, providing that no local law shall be passed regulating the practice in courts of justice, for it is an act that applies to every county in the State.—*Northern Counties Trust v. Sears*, 388.

POWERS OF COUNTY COURTS.

6. County Courts, being of special and limited jurisdiction, have only those powers conferred by statute, and cannot pay off or take assignments of claims against creditors of the county, so as to succeed to the rights of such creditors.—*Bank of Idaho v. Malheur County*, 420.

JURISDICTION OF COUNTY COURTS TO CONSTRUER WILLS.

7. A court having power to control the conduct of executors, to settle their accounts, to direct the payment of debts and legacies, and to distribute estates, such as is conferred by sections 895 and 1191 of

COURTS—CONCLUDED.

Hill's Code of Oregon, has, by necessary implication, the further power to construe wills so far as they dispose of personalty, and, probably, also as to real property, though this is not so certain.—*In re John's Will*, 494.

CONSTRUCTION OF WILL BY COUNTY COURT.

8. A probate court ought not to entertain a proceeding instituted merely for the purpose of having a judicial construction of a will; the interpretation of such an instrument should be only a step in the attainment of some other object. This rule is analogous to the well-established practice in equity.—*In re John's Will*, 494.

APPEAL FROM JUSTICE'S COURT—CORRECTING RECORD.

9. The jurisdiction of the Circuit Court on appeal from a Justice's, cannot be defeated by affidavit that the justice, in contravention of his duty, failed to enter in his docket a matter material to the issue: the proper remedy in such case is a nunc pro tunc order from the justice correcting the record.—*Jacobs v. Oren*, 593.

JUSTICE'S COURT—DOCKET SHOWING STAY OF PROCEEDINGS.

10. The requirement of section 2122, Hill's Code, that a justice of the peace shall make an entry in his docket when an appeal is prosecuted from his decision showing whether or not the proceedings are stayed, is probably intended to be only directory; but whether directory or mandatory, a failure to make such an entry will not be allowed to defeat the appeal, since the omission can be remedied by application to the justice.—*Jacobs v. Oren*, 593.

TIME FOR FILING JUSTICE'S TRANSCRIPT.

11. On appeal from a Justice's Court the transcript may be filed at once in the Circuit Court without waiting to see whether there will be any objections filed to the sureties.—*Jacobs v. Oren*, 593.

COVENANTS. Dependent and Independent. See CONTRACTS, 11, 12.
CREDITORS.

Diverted Corporate Assets—Creditor's Bill. See FRAUD, 2.

Attachment on False Claim—Rights of Creditors. See FRAUD, 3.

When Defrauded Creditors May Replevin. See FRAUD, 4.

Right of Attaching Creditor to Attack Transfer. See FRAUD, 5.

Debtor May Prefer Creditors. See INSOLVENTS, 2.

No Preferences in General Assignments. See INSOLVENTS, 3.

CREDITOR'S BILL.

Where corporate assets have been diverted to the payment of private debts, equity will pursue the assets so diverted, and apply them, if recovered, to the payment of the corporate debts, according to their respective priorities.—*Craig v. California Vineyard Company*, 43.

CRIMINAL LAW AND EVIDENCE.

CRIMINAL LAW, 1-9.

CRIMINAL EVIDENCE, 10-13.

CRIMINAL LAW AND EVIDENCE—CONTINUED.

HOMICIDE BY POISONING—INSTRUCTIONS AS TO DEGREE OF GUILT.

1. Sections 1714 and 1727 of Hill's Code, considered together, do not provide that every death caused by poisoning shall be murder in the first degree, but only that the State must prove by some appropriate evidence, as, for example, by showing the giving of poison, or a waylaying, that deliberation and premeditation existed in the mind of the defendant when the deadly act was committed.—*State v. Ellsworth*, 145.

2. One charged with murder in the first degree by poisoning is not entitled as a matter of law to have the jury instructed to convict as charged or acquit. If there is any evidence tending to raise a doubt as to the intent with which the act was done, the conviction should be for a lower degree only, and evidence of good reputation is sufficient for that purpose. Thus, where deceased died in a convulsion soon after defendant administered what he claimed was a powder of corn starch, and strychnine was found in her stomach, and experts said she died of strychnine poison, though there was no evidence that strychnine was kept by defendant or deceased, from which it might be inferred that he administered it by mistake, yet, he having offered proof of his general reputation for peace and good order, tending to raise a doubt as to the intent with which the act was done, if done by him, it was proper to instruct on manslaughter.—*State v. Ellsworth*, 146.

ABATEMENT OF APPEAL BY DEATH.

3. An appeal from a conviction of a crime abates on the death of the defendant, and it cannot be prosecuted to a final determination by the personal representatives of the accused, even though the abatement leaves in force a judgment for costs, enforceable against his estate.—*State v. Martin*, 108.

"WAREHOUSE" DEFINED.

4. On trial of a mill company's manager for shipping wheat stored in the company's warehouse without written assent of the holder of the receipt therefor, it appeared that, according to its usual course of business, known to the person whose wheat was shipped, all wheat received became a part of the consumable stock of the mill, was manufactured into flour and other mill products, and sold; that it satisfied its obligation to the depositors by paying them the market price when demanded, or by returning a like quantity and quality of other wheat; and that, in the former case, no storage was charged, but in the latter a charge of eight cents a bushel was made. *Held*, that the company was not engaged in the warehouse business, and the wheat was not received on storage, within the Oregon statute regulating warehousemen, Hill's Code, §§ 4201-4207.—*State v. Stockman*, 36.

INFERENCE FROM POSSESSION OF STOLEN PROPERTY.

5. The inference from the possession of stolen property is entirely one of fact—it never rises to the dignity of a conclusive presumption of guilt, and is strong or weak according to the surrounding circumstances.—*State v. Pomeroy*, 16.

RECEIVING STOLEN PROPERTY.

6. On a prosecution for receiving and concealing stolen goods,

CRIMINAL LAW AND EVIDENCE—CONCLUDED.

under section 1774 of Hill's Code, the fact that defendant secreted and harbored the thieves, so as to aid them to escape arrest, thereby rendering himself amenable as an accessory to the larceny, is no defense, if he also received and concealed the property, knowing it to be stolen.—*State v. Pomeroy*, 16.

EXPRESSION OF OPINION BY TRIAL JUDGE.

7. An instruction that the jury have no right to reject the testimony of the wife and daughter of the accused simply because it came from a source in which there would be strong motives to give the "most favorable coloring possible" to the facts on behalf of the accused, is prejudicial error, as an expression of opinion on the motives of the witnesses.—*State v. Pomeroy*, 17.

INTENT AS AFFECTING DEGREE OF GUILT.

8. Where there is any evidence tending to raise a doubt in the minds of the jury as to the intent with which a criminal act was done, the conviction can be for only a lower degree of the offense charged.—*State v. Ellsworth*, 145.

EFFECT OF PLEA OF GUILTY.

9. A plea of guilty to a charge of violating a city ordinance is only an admission that defendant committed the acts charged, and is immaterial where the ordinance is void.—*Grossman v. City of Oakland*, 478.

DIRECTING VERDICT FOR INSUFFICIENT EVIDENCE.

10. If there is any evidence that by a fair construction tends to show the defendant guilty, the case must go to the jury, and the court ought not to direct a verdict of not guilty.—*State v. Pomeroy*, 16.

CORROBORATION OF ACCOMPLICE.

11. Testimony that a witness is acquainted with the handwriting of defendant charged with forgery, and recognizes the latter's signature, which appears attached to the forgery as that of a witness, to be in his handwriting, sufficiently corroborates an accomplice, and tends to connect the defendant with the commission of the crime charged.—*State v. Tice*, 458.

DECLARATIONS OF CO-CONSPIRATOR.

12. Statements concerning a conspiracy made by one of the parties thereto after the common purpose has been effected are not competent evidence against other conspirators.—*State v. Tice*, 459.

EVIDENCE BY CO-CONSPIRATOR OF ANOTHER CRIME.

13. On a charge of forging a will in pursuance of a conspiracy in which defendant participated, where the evidence tended to show that defendant forged the signature, testimony that an acknowledgment thereto was forged by others of the conspirators after the signature was written is admissible, since the question of whether the acknowledgment was part of the contemplated forgery is for the jury.—*State v. Tice*, 457.

CROP MORTGAGE. See CHATTEL MORTGAGE, 3.

CROSS APPEAL.

Party Not Appearing Is Presumably Satisfied. See APPEAL, 2.

CROSS-EXAMINATION.

To Show Bias or Feeling of Witness. See TRIAL, 2.

Foundation for Showing Hostility of Witness. See TRIAL, 2.

Discretion as to Manner of Conducting. See TRIAL, 5.

To Show Means and Extent of Knowledge. See TRIAL, 3, 4.

CRUEL AND INHUMAN TREATMENT.

Violent Conduct as Ground for a Divorce. See DIVORCE.

CURATIVE ACT.

The act of October 29, 1870 (Laws 1870, p. 67), curing defects in proceedings for laying out and establishing highways, does not make valid any proceeding of that kind that was originally void through want of notice; for, while the legislature may cure irregularities, it cannot make good retrospectively what it had no power to originally authorize. —*Grady v. Dundon*, 333.

DAMAGES.

BREACH OF PROMISE—AGGRAVATION OF DAMAGES.

1. On a trial for breach of a marriage promise, an article published over defendant's signature, attacking plaintiff's character, and an insulting letter addressed by defendant to plaintiff, both written after the commencement of the action, are admissible as tending to prove the animus of defendant in refusing to perform the marriage contract, and may be considered in aggravation of damages. —*Osmun v. Winters*, 178.

EXCESSIVE DAMAGES—SPECIFICATION OF ERROR.

2. The question of excessive damages cannot be raised on appeal unless specified as a ground of error in the notice of appeal. —*Osmun v. Winters*, 178.

MEASURE OF DAMAGES—COVENANT TO PAY A MORTGAGE.

3. Where part of a mortgaged tract is conveyed to grantees who covenant to pay the debt and save the mortgagor harmless therefrom, but the entire premises are afterward sold under the mortgage foreclosure, the measure of recovery on the broken covenant is what the reserved part of the tract was worth at the time of the foreclosure. —*Haas v. Dudley*, 355.

REMOTE AND SPECULATIVE DAMAGES.

4. The loss of anticipated profits from the additional value which would have been conferred upon town lots by the construction of a railroad to the town in accordance with a subsidy contract is too remote and speculative to be available as a recoupment or set-off in an action by the company upon the contract. —*Coos Bay Railroad Company v. Nosler*, 547.

DEATH

Of Defendant Abates Criminal Appeal. See APPEAL, I.

DEBTOR AND CREDITOR.

Replevin for Fraud of Vendee. See REPLEVIN.

DEBTOR AND CREDITOR—CONCLUDED.

Right of Sheriff to Attack Stranger's Title. See ATTACHMENT, 2, 3.

Attachment on False Claim Is Void. See ATTACHMENT, 1.

Sales by Mortgagor of Chattels. See CHATTEL MORTGAGES, 2.

Cannot Be Preferences in General Assignments. See INSOLVENTS, 2.

Rule for Construing a Series of Conveyances Claimed to Constitute Together a General Assignment. See INSOLVENTS, 3.

DECEDENT'S ESTATE. Same as EXECUTORS.

DECREES.

Vacating Final Decree—Proper Practice. See EQUITY, 10.

DEEDS.**SUFFICIENCY OF DESCRIPTION IN TAX DEED.**

1. The correct interpretation of section 2773, Hill's Code, is that if land is so situated that it cannot be definitely described by legal subdivisions, or by lots and blocks, it must be described in some other manner that will make its location certain. Measured by this rule, a description in an assessment roll and in a tax deed as a "fraction of lot 2 in block 49," for example, is so indefinite that it entirely fails to identify any parcel of land whatever, and is absolutely meaningless.—*Jory v. Palace Dry Goods Company*, 196.

ESTATE CONVEYED BY AN AGREEMENT TO SELL REAL PROPERTY.

2. At law, a bond for a deed, being in effect and operation a contract for the sale of land, conveys no estate whatever, and such rights as the obligees in such an instrument may thereby acquire are transferable without the formalities of a deed.—*Sayre v. Mohney*, 238.

DEFALCATION

Of Public Official—Liability of Sureties. See OFFICIAL BONDS.

DEFAULT.

The question of the sufficiency of a complaint cannot be raised on appeal from a judgment given for want of an answer.—*Weaver v. Southern Oregon Company*, 348.

DEFECT OF PARTIES.

Waiving Objections by Failing to Demur. See PLEADING, 3.

DEFINITIONS. Same as WORDS AND PHRASES.

DEGREES OF GUILT.

In Cases of Homicide by Poisoning. See CRIMINAL LAW, 1, 2.

DEMURRER.

Not Demurring Waives Defect of Parties. See PLEADING, 3.

DESCRIPTION in Tax Deed—Sufficiency. See DEEDS, 1.

DIRECTING VERDICT.

Improper if There Is Any Conflicting Evidence. See TRIAL, 11.

DISCRETION OF COURT.

Changing Venue Is Reviewable Only for Abuse. See TRIAL, 10.

Amending Pleadings During Trial. See TRIAL, 17, 18.

Order of Introducing Testimony. See TRIAL, 5.

Allowing Amendments to Returns on Writs. See TRIAL, 19.

Time of Presenting and Settling Bills of Exceptions. See TRIAL, 20.

DISMISSAL OF APPEAL.

Supreme Court—Insufficiency of Notice. See APPEAL, 7.

Joint and Several Judgment in Circuit Court. See APPEAL, 11.

Justification of Sureties in Justice's Court. See APPEAL, 17.

Incomplete Record in Justice's Court. See APPEAL, 16, 18.

DIVERSION OF WATERS. Same as WATERS.

DIVORCE.

A divorce for cruel and inhuman treatment, and personal indignities rendering life burdensome, should be granted on evidence that defendant was frequently intoxicated, and was quarrelsome and violent; that at one time he kicked out a door panel; that at another, while violently cursing his wife, he shot off a pistol several times; and that he was in the habit, without provocation, of using vile and offensive language in her presence.—*Ryan v. Ryan*, 226.

DUE PROCESS OF LAW.

Taking Private Property for Public Use. Notice Is Absolutely Necessary. See HIGHWAYS, 2.

EJECTMENT.

In an action by a tenant against his co-tenant to be admitted into possession, a denial in the answer of plaintiff's title and right of entry is an ouster.—*Grant v. Paddock*, 312.

ELECTIONS.

A town charter providing that all laws regulating general elections shall govern elections under the charter does not impose on the town recorder the duty of determining tie votes by lot in town elections, in the manner prescribed for county clerks in county and precinct elections by section 2539 of Hill's Code, since the charter provides neither that the town recorder shall be substituted for the county clerk in the application of the statute to the town, nor that the method of determining ties in county elections shall be adopted, instead of the different method prescribed in legislative elections.—*Dunham v. Hyde*, 385.

EMINENT DOMAIN.

RIGHT OF EMINENT DOMAIN.

1. The right of eminent domain is one that can be exercised only by legislative authority, and for a use beneficial to the public, and whether a proposed use is a public one is for the courts to determine as a question of fact.—*Bridal Veil Lumbering Company v. Johnson*, 205.

EMINENT DOMAIN—CONCLUDED.

PUBLIC USE.

2. A railroad chartered to extend from a certain town past a saw mill, through rough, mountainous, timbered, and sparsely settled country, to the middle of a certain section on lands of the United States, without going near any other town, city, or settlement, or other railroad, and which has been built only a very few miles from the town into the timbered region, and has no freight or passenger depot, passenger coaches, or freight cars, except logging trucks, and has never charged passengers any fare—is a railroad for which eminent domain may be exercised, where it is not shown that it was intended simply as a logging road, and everyone having occasion to use it as a passenger or for the transportation of freight has a right to require the service.—*Bridal Veil Lumbering Company v. Johnson*, 205.

ESTABLISHING PUBLIC HIGHWAYS—NOTICE IS JURISDICTIONAL.

3. The legislature can prescribe the necessity and manner of taking private property for public use, but somewhere in the course of the proceeding there must be a notice to the owner of the property affected, otherwise the taking will be without "due process of law."—*Grady v. Dundon*, 333.

ENACTMENT OF STATUTE.

Formalities Required to Be Shown. See STATUTES, 4.

EQUITY.

JURISDICTION—EQUIVALENT OF SPECIFIC PERFORMANCE.

1. In a suit for specific performance by the holder of an option to purchase a mine in operation, an equity court cannot decree that plaintiff be put in possession and that the time for purchasing be extended for a period equal to the time the property has been withheld by the wrongful act of the vendor, because it would be making a new and different contract, and because it would require a protracted supervision over a complicated and technical matter.—*Clarno v. Grayson*, 112.

VENDOR AND PURCHASER—POSSESSION AS NOTICE.

2. Possession of land by a third person is constructive notice of such person's legal and equitable rights.—*Cooper v. Thomason*, 162.

ESTATE CONVEYED BY A BOND FOR A DEED.

3. In equity, a bond for a deed is held to transfer the equitable estate, leaving the legal title in the grantor as a security for the payment of the purchase money.—*Sayre v. Mohney*, 238.

SET-OFF AGAINST INSOLVENT JUDGMENT DEBTOR.

4. Equity will entertain a suit to compel the allowance of a set-off against a judgment on a note obtained by one who held it only as collateral for a debt less than such note, where this latter fact was not known to the maker until the trial of the law action (and so was not pleaded), and the payee is insolvent.—*Mitchell v. Holman*, 280.

REFORMATION OF WRITTEN CONTRACTS—MISTAKE.

5. Equity will not reform a written contract on the ground of

EQUITY—CONCLUDED.

mistake unless the party asking reformation shows clearly, not only that the alleged mistake exists, but that it was mutual, and was not caused by his negligence.—*Mitchell v. Holman*, 280.

REFORMATION OF CONTRACT—MISTAKE AS TO LEGAL EFFECT.

6. That the legal effect of the language used in a contract is different from what one of the parties supposed it to be is not a ground for relief from the contract, or for reforming it, after one party has executed his part.—*Mitchell v. Holman*, 280.

JURISDICTION OVER TRUSTS.

7. Courts of equity in this country, except when prohibited by statute, exercise original inherent jurisdiction over charitable trusts.—*In re John's Will*, 495.

EQUITY WILL APPOINT TRUSTEES FOR A CHARITY.

8. A charitable trust will not be permitted to fail because the trust may outlive the trustees who are appointed to administer it; for charity is ever a favorite of equity, and a valid trust of that kind will not be suffered to lapse for mere want of a trustee. So, if a donation to charity is immediate and absolute, and a competent trustee is appointed to take, the other conditions being sufficient, a trust arises at once, the property becomes impressed with it, and immediately passes beyond the reach of the heirs or residuary legatees.—*In re John's Will*, 495.

9. A failure to act on the part of persons authorized to appoint the trustees of a charitable gift will not result in a failure of the trust, for equity will appoint and see that the wishes of the donor are carried out.—*In re John's Will*, 495.

JURISDICTION OF EQUITY TO VACATE DECREE.

10. A petition will not lie in the Supreme Court for a rehearing and for an order opening a decree that has been affirmed on appeal in order that newly discovered evidence may be considered; the remedy being by an original suit to vacate the decree under section 381 of the Code.—*Nessley v. Ladd*, 564.

INJUNCTION BY TAXPAYER TO PREVENT THREATENED INJURY.

11. A private taxpayer may maintain a suit to enjoin the issuance of a warrant for items illegally allowed by the county court.—*Brownfield v. Houser*, 534.

12. A taxpayer may maintain a suit in his own name to restrain the creation of an illegal debt by a municipal corporation where the effect of such corporate action will be to increase his burden of taxation; but where the funds have already been misapplied and are gone, the proper party to complain is the injured corporation, either in its own name or on the relation of some proper person.—*Brownfield v. Houser*, 534.

EQUALIZATION OF TAXES. Same as BOARD OF EQUALIZATION.

"ERECTIONS" in a Lease Defined. See WORDS AND PHRASES.

ERROR.

Excessive Damages Must Be Assigned as Error. See **APPEAL**, 3.

Harmless Error Not Reversible Error. See **HARMLESS ERROR**.

ESTATES OF DECEDENTS. Same as **EXECUTORS**.

ESTOPPEL.

LACK OF JURISDICTION.

1. Where a street improvement is undertaken without jurisdiction, the adjoining property owners are not estopped from resisting payment therefor by having failed to object while the work was in progress.—*Smith v. Minto*, 351.

PLEADING ESTOPPEL.

2. A party who has an opportunity to plead an estoppel upon which he relies, and fails to do so, but goes to issue on the fact, waives the estoppel and puts the matter at large, and the jury may disregard the estoppel, and are at liberty to find the truth.—*Nickum v. Burckhardt*, 464.

PRIVITY BETWEEN CORPORATIONS AND STOCKHOLDERS.

3. A stockholder and his corporation are in privity as to an adjudication against the corporation in matters pertaining to duties it owes its members; but when the corporation sues a delinquent member for his stock subscription, it cannot be said to represent any shareholder, so as to bind him by the result, for it is apparent that in such a case the corporation and the stock subscriber are strictly adversaries.—*Nickum v. Burckhardt*, 465.

4. A judgment for defendant in an action by a receiver of a corporation against an alleged stock subscriber, involving the sole issue whether or not he was a subscriber at the date of the attempted organization, is not available as an estoppel against the receiver in a subsequent action to recover an unpaid subscription from another alleged stockholder—in other words, the action of the corporation was against the stockholder sued, and not in defense of his rights or interests, and binds only the parties to it.—*Nickum v. Burckhardt*, 465.

BY STIPULATING FOR PRINTED ABSTRACT.

5. Where the parties stipulate that a printed abstract shall be filed in lieu of the usual transcript on appeal (rules 4 and 13, Rules of Supreme Court, 24 Or., pp. 595, 601), one of them cannot afterwards object that the court has no jurisdiction, under section 541, Hill's Code, providing that the jurisdiction of the appellate court shall attach only on filing a transcript.—*Fratt v. Wilson*, 542.

EVIDENCE. For Criminal Evidence see **CRIMINAL LAW**, 10-13.

PAROL EVIDENCE—CONSIDERATION FOR EXPRESS TRUST.

1. In a suit to enforce a trust in personal property which is the proceeds of land held in trust, parol evidence is admissible to prove the original agreement under which the premises were held, as a consideration for a subsequent declaration of the trust by the trustee.—*Cooper v. Thomason*, 162.

EVIDENCE—CONTINUED.

BREACH OF PROMISE—FAILING TO PROVE CHARGES IN ANSWER.

2. On a trial for breach of a marriage promise, an unproved charge of plaintiff's unchastity, made in the answer, may be considered in connection with all the rest of the evidence in aggravation of damages, as tending to show that defendant was actuated by malice.—*Osmun v. Winters*, 178.

BREACH OF PROMISE—EVIDENCE.

3. A resolution of a society to which both the plaintiff and defendant in an action for breach of promise of marriage were members, congratulating them upon their supposed marriage, and directing a copy thereof to be forwarded to them, is admissible in proof of the promise of marriage, since it tends, though remotely, to show a and may be considered in aggravation of damages.—*Osmun v. Winters*, 178.

BREACH OF PROMISE—AGGRAVATION OF DAMAGES.

4. On a trial for breach of a marriage promise, an article published over defendant's signature, attacking plaintiff's character, and an insulting letter addressed by defendant to plaintiff, both written after the commencement of the action, are admissible as tending to prove the animus of defendant in refusing to perform the marriage contract, and may be considered in aggravation of damages.—*Osmun v. Winters*, 178.

COMPETENCY OF EVIDENCE OF CO-CONSPIRATOR.

5. Where it is claimed that a conspiracy existed between certain persons, the statements of one of them touching the conspiracy, not made in the presence or hearing of the others, and not shown to have been authorized by them, are not admissible against the other alleged conspirators.—*Osmun v. Winters*, 178; *State v. Tice*, 457.

EVIDENCE—WAIVER OF PROOF.

6. A stipulation that a letter favorable to the adverse party may be read to the jury upon the condition that a deposition favorable to the stipulating party, but which was objectionable on account of certain irregularities, should also go in evidence, is not an admission that the letter is genuine, but merely dispenses with proof of its genuineness in the first instance.—*Osmun v. Winters*, 178.

PROOF OF HANDWRITING—COMPARISON WITH GENUINE.

7. Under section 765 of Hill's Code, providing that evidence as to handwriting may be given by a comparison by a skilled witness, or by the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, it is competent for a party to use as standards, for the purpose of showing by a comparison of handwriting that a material letter was written by such adverse party, any writings admitted or shown to be genuine, regardless of whether they refer to the matter in issue or not.—*Munkers v. Farmers' Insurance Company*, 211.

STANDARD OF COMPARISON FOR HANDWRITING.

8. A writing not admitted or treated as genuine by the party against whom it is offered cannot, under the terms of section 765,

EVIDENCE—CONTINUED.

Hill's Code, be received in evidence solely as a standard with which to compare a writing charged to be forged.—*State v. Tice*, 457.

EVIDENCE OF HANDWRITING—SIGNATURE BY MARK.

9. The testimony as to the genuineness of handwriting contemplated by section 764, Hill's Code, extends to crosses or marks made as signatures, but the peculiarities of such marks, and the circumstances surrounding their execution, should be carefully considered in determining the value and weight to be given thereto.—*State v. Tice*, 457.

EVIDENCE OF CHARACTER IN FIRE INSURANCE CASES.

10. In an action on a fire insurance policy, payment of which is contested on the ground that the fire was set by the insured, evidence as to the general good character of the plaintiff is not admissible, as this is not a case where the issue involves character, under section 842 of Hill's Code.—*Munkers v. Farmers' Insurance Company*, 211.

DIVORCE—CRUELTY.

11. A divorce for cruel and inhuman treatment, and personal indignities rendering life burdensome, should be granted on evidence that defendant was frequently intoxicated, and was quarrelsome and violent; that at one time he kicked out a door panel; that at another, while violently cursing his wife, he shot off a pistol several times; and that he was in the habit, without provocation, of using vile and offensive language in her presence.—*Ryan v. Ryan*, 226.

TESTIMONY OF USURY MUST BE CLEAR.

12. Forfeitures, though not favored, are firmly upheld as a penalty to the State for a violation of law, but proof of the transaction incurring such punishment must not be left to probability or conjecture.—*Barger v. Taylor*, 228.

NECESSARY PROOF OF USURY.

13. In order to establish usury it must be shown that the borrower paid for the loan, either directly or indirectly, a sum more than the amount of interest at the lawful rate, and that the lender either received some part of this excess, or authorized or ratified its exaction.—*Barger v. Taylor*, 228.

OPINION EVIDENCE.

14. The fact that a witness has had his attention called to scows, and has heard men accustomed to buying and handling such property discuss their value, does not render him competent to give an opinion of the value of a scow in controversy, where it is not shown that he ever saw the property in question, nor was even familiar with the market value of such articles, or knew anything about the cost or manner of their construction. Opinion evidence may in some cases be received, but it must first be made to appear that the witness has had the means of forming an intelligent opinion derived from an adequate knowledge of the nature and kind of property under consideration, and of its value.—*Oregon Pottery Company v. Kern*, 328.

PROMISSORY NOTE—EVIDENCE TO SHOW PAYMENT.

15. While there is a presumption that by giving a promissory

EVIDENCE—CONCLUDED.

note all the antecedent demands existing between the parties have been considered and adjusted, and that the amount expressed is the balance due the payee, yet this is not conclusive between the parties, and it may be shown that when the note was executed an unsettled account existed in favor of the maker against the payee, which it was agreed should be credited on the new note when adjusted, and that the account was afterwards adjusted, and the amount due thereon was larger than the amount of the note. Such testimony would not tend to vary the terms of a written instrument, but would show a payment.—*Williams v. Culver*, 375.

LIMITATIONS—CODE, SECTION 24, AS A RULE OF EVIDENCE.

16. The effect of any payment of principal or interest with regard to the running of the statute of limitations is not influenced by section 24 of Hill's Code, providing that no acknowledgment or promise shall be sufficient evidence of a new or continuing contract to take a case out of the operation of the statute, unless the same is in writing, signed by the party to be charged; this simply prescribes the character of evidence by which the acknowledgment or promise shall be proven, and in no wise affects the legal consequence of a part payment.—*Dundee Investment Company v. Horner*, 558.

ILLEGAL SEIZURE—EVIDENCE AGAINST SHERIFF.

17. In an action against an officer for illegal seizure, it cannot be shown that he knew the judgment on which his writ was founded had been paid; if the authority issuing the process has jurisdiction, a process regular on its face affords a complete protection to the officer who executes it.—*Barr v. Combs*, 29 Or. 399.

RETURNS ON WRITS AS EVIDENCE.

18. A return is evidence only of the acts performed in his official capacity by the officer who executed the process; and other matters that he may add are not competent evidence against any one for any purpose.—*Barr v. Combs*, 29 Or. 399.

EXECUTION.

RIGHT OF OFFICER TO QUESTION STRANGER'S TITLE.

1. Where an officer holds under an execution property taken from a stranger, the writ, when supported by the judgment on which it is issued, is a sufficient lien or title to enable him to question the sufficiency of a stranger's title, and he need not show, as in the case of such property held on attachment, the existence of a debt due from the attached debtor to the attaching creditor.—*Fisher v. Kelly*, 1.

MECHANICS' LIENS—BRIDGES.

2. Property exempt from sale on execution is not subject to mechanics' liens, unless the law conferring the special remedy so declares; thus, a bridge that is part of a public highway, not being liable to judicial sale, is not subject to mechanics' liens.—*Bank of Idaho v. Malheur County*, 420.

PROTECTION OF SHERIFF—LEVYING EXECUTION.

3. Where a sheriff has levied on goods of a judgment debtor, under an execution regular on its face, and issued out of a court of

EXECUTION—CONCLUDED.

competent jurisdiction, he is protected by the writ.—*Barr v. Combs*, 29 Or. 399.

SHERIFF'S RETURN ON EXECUTION.

4. It is a sheriff's duty in his return to certify only to the acts performed by him in his official capacity in the levy of an execution; and his certificate as to some agreement between the parties, of which he may have had knowledge, is not admissible against either of them.—*Barr v. Combs*, 29 Or. 399.

EXECUTORS AND ADMINISTRATORS.

PROBATE OF WILL APPOINTING EXECUTOR.

1. A will that appoints an executor is entitled to probate regardless of whether it purports to dispose of anything or not.—*In re John's Will*, 494.

PROBATE OF WILL PARTIALLY VOID.

2. A will appointing executors and directing the payment of funeral expenses and the expenses of administration is entitled to probate, though its other provisions creating a charitable trust are invalid.—*In re John's Will*, 494.

PETITION FOR DIRECTION OF EXECUTOR.

3. When the probate court has jurisdiction to direct and control the conduct and settle the accounts of executors, such as is conferred by section 895 of Hill's Code, a petition for the revocation of the probate of a will, instituted several years after the original probate, during which time the executor has been antagonistic to the interests of the petitioners, may be considered as a prayer for the direction of the executor in the administration of the personalty.—*In re John's Will*, 494.

EXEMPTION.

A county bridge that is part of the public highway is exempt from execution on judicial process, and therefore not subject to liens for material or labor used in its construction or repair.—*Bank of Idaho v. Malheur County*, 420.

"EXPENSE ACCOUNTS" of Sheriffs. See WORDS AND PHRASES.

EXPERT EVIDENCE.

Testing Source and Extent of Information of Witness by Cross-Examination. See TRIAL, 3, 4.

FARM LEASE.

Priority of Chattel Mortgage Over Reserved Title to Crop. See LANDLORD AND TENANT, 1.

FEES.

Fee Bill of 1893 Is Constitutional. See CONSTITUTIONAL LAW, 2-9.

Of Sheriffs Are Limited by Act of 1893. See SHERIFFS, 1.

Of Sheriffs Under Act of 1893—Expenses of Serving Processes in Home County. See SHERIFFS, 2.

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FILING ABSTRACT OF RECORD.

Abstract by Stipulation Confers Jurisdiction. See APPEAL, 13.

FILING TRANSCRIPT.

In Circuit Court on Appeal From Justice's Court—How Soon May Be Done. See APPEAL, 14.

FINAL ORDER That May Be Reviewed. See WRIT OF REVIEW.

FINDINGS OF FACT.

SUFFICIENCY OF FINDINGS TO SUPPORT CONCLUSIONS.

1. Findings that the parties thereto agreed that a chattel mortgage should be kept secret, that the agreement was carried out, and that the instrument was executed with intent to hinder, delay and deceive creditors, are sufficient to support a conclusion that such mortgage was void as to attaching creditors.—*Fisher v. Kelly*, 2.

CONCLUSIVENESS OF FINDINGS ON APPEAL.

2. A finding of fact by a trial court in a law action will not be disturbed on appeal if there is any evidence to support it.—*Liebe v. Nicolai*, 364.

FIRE INSURANCE.

Objections to Proofs of Loss. See INSURANCE, 1, 2.

Parol Waiver of Conditions of Policy. See INSURANCE, 3.

Evidence of Character of Insured. See INSURANCE, 4.

FORFEITURES

Are Not Favored, but Will Be Upheld. See USURY, 3.

FOUNDATION.

For Showing Hostility of Witness. See TRIAL, 2.

For Impeachment of Witness. See TRIAL, 2.

FRAUD AND FRAUDULENT CONVEYANCES.

FRAUDULENT TRANSFERS—RIGHTS OF CREDITORS.

1. Upon a full review of the evidence in this case it is established that there was such a fraudulent application of the assets of the California Vineyard Co., to the payment of the private debts of James Wolfsohn due the Merchants' National Bank of Portland, Oregon, as to render void, so far as attaching creditors are concerned, the bill of sale to and the judgment obtained by said bank against said vineyard company.—*Craig v. California Vineyard Company*, 43.

DIVERSION OF ASSETS—CREDITOR'S BILL.

2. Where corporate assets have been diverted to the payment of private debts, equity will pursue the assets so diverted, and apply them, if recovered, to the payment of the corporate debts, according to their respective priorities.—*Craig v. California Vineyard Company*, 43.

ATTACHMENT VOID FOR FRAUD.

3. Where an attachment action is intentionally brought on a false

FRAUD AND FRAUDULENT CONVEYANCES—CONCLUDED.

claim, or on a claim that is known to be partly false, the whole proceeding will be held void as against subsequent attaching creditors; though this may not be true where the just and false are inadvertently blended in one claim.—*Craig v. California Vineyard Company*, 43.

RIGHT TO REPLEVIN FOR FRAUD OF VENDEE.

4. Where an insolvent orders large quantities of goods in anticipation of failure, for the purpose of surrendering them to a preferred creditor, and such goods are thereafter fraudulently attached by such creditor, the vendors of the property thus obtained may rescind the sales, and bring replevin to recover possession of their respective goods.—*Craig v. California Vineyard Company*, 43.

RIGHT OF ATTACHING OFFICER TO DISPUTE TITLE.

5. Before an officer who is holding attached property that is claimed by a stranger can justify his possession on the ground that he is the agent of the attaching creditors, he must show not only his writ but also that the plaintiffs in the writ were actual creditors of the defendant; and, having thus brought his principals into privity with the attached property, he may attack the stranger's title.—*Fisher v. Kelly*, 1.

EFFECT OF AGREEMENT NOT TO RECORD CHATTEL MORTGAGE.

6. A mere agreement between mortgagor and mortgagee that the mortgage shall not be filed does not render the mortgage fraudulent as to prior creditors of the mortgagor, unless they thereafter deal with the mortgagor as they would not have done had the mortgage been filed.—*Fisher v. Kelly*, 1.

CHATTEL MORTGAGE—SALES BY MORTGAGOR.

7. The fact that, after the execution and delivery of a secret chattel mortgage, the mortgagor continued to dispose of the goods for his own benefit, does not show that the conveyance was fraudulent, unless it further appears that it was done pursuant to an agreement with the mortgagee. In such case the mortgage would be fraudulent in fact as to all creditors of the mortgagor, both those existing when it was made, and those who became so subsequently, under section 3053 of Hill's Code.—*Fisher v. Kelly*, 2.

FINDING TO SUPPORT CONCLUSION OF FRAUD.

8. Findings that the parties thereto agreed that a chattel mortgage should be kept secret, that the agreement was carried out, and that the instrument was executed with intent to hinder, delay, and deceive creditors, are sufficient to support a conclusion that such mortgage was void as to attaching creditors.—*Fisher v. Kelly*, 2.

PREFERENCES IN ASSIGNMENTS.

9. In cases where several conveyances are executed about the same time, and it is sought to have them considered together as forming a general assignment, the guiding principle is the actual intention of the parties; and if the instrument which is claimed to create an illegal preference was given and received in good faith, to secure or pay a genuine debt, and not as a part of an attempt to evade the prohibition against preferences, it will be sustained, however near in point of time it may be to a subsequently executed general assignment.—*Inman v. Sprague*, 321.

FRAUDS, STATUTE OF. Same as STATUTE OF FRAUDS. HANDWRITING.

PROOF BY COMPARISON WITH GENUINE WRITINGS.

1. Under section 765 of Hill's Code, providing that evidence as to handwriting may be given by a comparison by a skilled witness, or by the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, it is competent for a party to use as standards, for the purpose of showing by a comparison of handwriting that a material letter was written by such adverse party, any writings admitted or shown to be genuine, regardless of whether they refer to the matter in issue or not.—*Munkers v. Farmers' Insurance Company*, 211.

STANDARD OF COMPARISON.

2. A writing not admitted or treated as genuine by the party against whom it is offered cannot, under the terms of section 765, Hill's Code, be received in evidence solely as a standard with which to compare a writing charged to be forged.—*State v. Tice*, 457.

SIGNATURE BY MARK.

3. The testimony as to the genuineness of handwriting contemplated by section 764, Hill's Code, extends to crosses or marks made as signatures, but the peculiarities of such marks, and the circumstances surrounding their execution should be carefully considered in determining the value and weight to be given thereto.—*State v. Tice*, 457.

HARMLESS ERROR.

A letter from an indorsee of a note to his attorney after it had been delivered to the latter for collection explaining an indorsement thereon by him to the payee, is not admissible for the purpose of showing title to the note in the indorsee, but its admission is harmless where the note itself is produced and shows title in the indorsee.—*Spreckels v. Bender*, 577.

HIGHWAYS.

HIGHWAYS—JURISDICTION OF COUNTY COURTS.

1. In Oregon, county courts are of inferior and limited jurisdiction in the matter of laying out and establishing roads, but the same intendments obtain in favor of the regularity of their proceedings as prevail in courts of general jurisdiction, when the record shows that jurisdiction has been obtained of the particular subject and of the parties interested in locating and establishing the road.—*Grady v. Dundon*, 333; *Sime v. Spencer*, 340.

ESTABLISHING PUBLIC HIGHWAYS.

2. The legislature can prescribe the necessity and manner of taking private property for public use, but somewhere in the course of the proceeding, there must be a notice to the owner of the property affected, otherwise the taking will be without "due process of law"; so, an order of a county court establishing a county road, made without the notice required by section 4063, Hill's Code, is entirely void for lack of jurisdiction.—*Grady v. Dundon*, 333.

HIGHWAYS—CONCLUDED.

JURISDICTIONAL DEFECT—CURATIVE ACT.

3. The act of October 29, 1870 (Laws 1870, p. 67), curing defects in proceedings for laying out and establishing highways, does not make valid any proceeding of that kind that was originally void through want of notice; for, while the legislature may cure irregularities, it cannot make good retrospectively what it had no power to originally authorize.—*Grady v. Dundon*, 333.

ADVERSE USER—COUNTY ROAD.

4. The uninterrupted obstruction of a county road for more than ten years bars the rights of the public by adverse possession, though on a few occasions persons have been permitted to drive across the premises.—*Grady v. Dundon*, 333.

PETITION FOR HIGHWAY—SUFFICIENCY OF DESCRIPTION.

5. Under section 4062 of Hill's Code, requiring a petition for a county road to "specify the place of beginning," etc., a petition which merely describes the road as "commencing in the center of the county road leading from P. to A., at a point about 150 yards in a southwesterly course from the dwelling of S., thence," etc., is insufficient, as it does not indicate with reasonable certainty the point of beginning.—*Sime v. Spencer*, 340.

BRIDGES NOT SUBJECT TO LIENS.

6. Bridges that are parts of the public highways cannot be subjected to liens, as they are public property.—*Bank of Idaho v. Malheur County*, 420.

USE OF PUBLIC MONEY FOR COUNTY BRIDGES.

7. Section 896, subd. 4. of Hill's Code, providing for erecting bridges on public highways, and section 4140, giving county courts power to expend public money for bridges on county roads, impliedly prohibit the expenditure of public money for any bridges except those on county roads. Per Moore, J., *arguendo*.—*Bank of Idaho v. Malheur County*, 420.

HOMICIDE.

Death by Poison—Degree of Guilt. See CRIMINAL LAW, 1, 2.

HOSTILITY OF WITNESS.

Jury Should Know Feelings of Witnesses. See TRIAL, 1.

Foundation for Showing Hostility. See TRIAL, 2.

HUSBAND AND WIFE.

Where a husband, without objection, uses his wife's money jointly with his own in a series of business ventures, no trust in favor of the wife can attach to a tract of land bought partly with the proceeds of the business and partly with borrowed money.—*Barger v. Barger*, 268.

IMPEACHMENT OF WITNESS.

Rule for Showing Hostility and Impeachment. See TRIAL, 2.

IMPLIED TRUST.

Purchase Partly With Wife's Money. See TRUSTS, 7.

INFERENCES.

The inference from the possession of stolen property is entirely one of fact—it never rises to the dignity of a conclusive presumption of guilt, and is strong or weak according to the surrounding circumstances.—*State v. Pomeroy*, 16.

INHUMAN TREATMENT.

Example of Cruelty Justifying a Divorce. See DIVORCE.

INJUNCTION.

INJUNCTION BY TAXPAYER TO PREVENT THREATENED INJURY.

1. A taxpayer may maintain a suit in his own name to restrain the creation of an illegal debt by a municipal corporation where the effect of such corporate action will be to increase his burden of taxation; but where the funds have already been misapplied and are gone, the proper party to complain is the injured corporation, either in its own name or on the relation of some proper person.—*Brownfield v. Houser*, 534.

2. A private taxpayer may maintain a suit to enjoin the issuance of a warrant for items illegally allowed by the county court.—*Brownfield v. Houser*, 534.

INSOLVENTS AND INSOLVENCY.

JURISDICTION OF EQUITY—SET-OFF AGAINST INSOLVENT.

1. Equity will entertain a suit to compel the allowance of a set-off against a judgment on a note obtained by one who held it only as collateral for a debt less than such note, where this latter fact was not known to the maker until the trial of the law action (and so was not pleaded), and the payee is insolvent.—*Mitchell v. Holman*, 280.

GENERAL ASSIGNMENTS—PREFERENCES TO CREDITORS.

2. Section 3173 of Hill's Code, declaring that no general assignment by an insolvent for his creditors shall be valid unless made for the benefit of all the creditors, is intended to entirely destroy all such assignments with preferences, but its operation is confined to general assignments, and it does not limit or affect the right of a failing or insolvent debtor to pay or secure certain creditors with part of or all his property.—*Inman v. Sprague*, 321.

SERIES OF DEEDS CONSTRUED AS AN ASSIGNMENT.

3. In cases where several conveyances are executed about the same time, and it is sought to have them considered together as forming a general assignment, the guiding principle is the actual intention of the parties; and if the instrument which is claimed to create an illegal preference was given and received in good faith, to secure or pay a genuine debt, and not as a part of an attempt to evade the prohibition against preferences, it will be sustained, however near in point of time it may be to a subsequently executed general assignment.—*Inman v. Sprague*, 321.

INSTRUCTIONS TO JURIES.

Degrees of Guilt in Poisoning Cases. See CRIM. LAW, 1, 2.

Opinion by Judge on Motives of Witnesses. See CRIM. LAW, 7.

INSTRUCTIONS TO JURIES—CONCLUDED.

Power of Judge to Direct Verdict When Evidence Is Conflicting. See CRIMINAL LAW, 10.

INSURANCE.

PROOF OF FIRE LOSS.

1. An insurance company must act fairly toward its policy-holders, and when an honest attempt has been made to present proofs of loss, the company must, with reasonable promptness, state definitely its objections to the proofs, or it will be estopped from urging them; thus a return of proofs of loss with the mere statement that they were "declined and objected to" is practically an acceptance, for the objection is too indefinite to be obviated.—*Schmurr v. State Insurance Company*, 29.

2. On the same principle, an objection that the certificate is not made by the proper officer is waived unless made when the proofs are presented.—*Schmurr v. State Insurance Company*, 29.

PAROL WAIVER OF CONDITIONS OF POLICY.

3. Where a company, after full knowledge of facts that render void one of its policies, retains the premium and fails to cancel the policy, it waives the forfeiture, and this can be done by conduct or by parol, although the policy itself provides that it shall be in writing.—*Schmurr v. State Insurance Company*, 29.

EVIDENCE OF CHARACTER IN FIRE INSURANCE CASES.

4. In an action on a fire insurance policy, payment of which is contested on the ground that the fire was set by the insured, evidence as to the general good character of the plaintiff is not admissible, as this is not a case where the issue involves character, under section 842 of Hill's Code.—*Munkers v. Farmers' Insurance Company*, 211.

IRRIGATION. Same as WATERS AND WATER RIGHTS.

JOINT AND SEVERAL JUDGMENT.

One of Such Judgment Debtors May Appeal. See APPEAL, 11.

JOURNALS OF LEGISLATURE.

How Enrolled Bills May Be Affected by. See STATUTES, 4.

JUDGMENTS.

PLEADING A JUDGMENT.

1. Allegations that a certain court was of competent jurisdiction, that a certain person commenced in such court an action against another certain person for the recovery of a certain sum, and recovered judgment for the amount demanded, are sufficient to show the existence of a valid judgment, which is prima facie evidence of the existence of a debt from the defendant to the plaintiff in such action.—*Fisher v. Kelly*, 1.

WHEN AN ATTORNEY'S LIEN ATTACHES TO A JUDGMENT.

2. An attorney's lien does not attach to a judgment, or become binding on the judgment debtor, until the attorney has given notice of his lien to such debtor, and filed the original with the clerk of the

JUDGEMENTS—CONCLUDED.

court where the judgment was entered, as required by section 1044 of Hill's Code; so that if the debtor pays or settles the judgment before notice of the lien is served, the lien will not attach, regardless of whether the satisfaction has been entered or not.—*Day v. Larsen*, 247.

POWER OF THE SUPREME COURT TO MODIFY JUDGMENTS AT LAW.

3. The Supreme Court may differ from a trial court on the conclusions of law to be deduced from a given state of facts, in a law action, and thereupon remand the case with instructions to modify the judgment, but it cannot review questions of fact in such cases, except to ascertain whether the findings are supported by any evidence.—*Liebe v. Nicolai*, 365.

APPEAL FROM JOINT AND SEVERAL JUDGMENT.

4. Any one of several defendants against whom a joint and several judgment has been rendered may appeal therefrom, even though he be one of a co-partnership, and the firm does not appeal.—*Car v. Alexander*, 438.

JURISDICTION

Of Equity to Decree a New Contract That Shall Be Equivalent to Specific Performance. See EQUITY, 1.

Of Equity—Set-Off Against Insolvent Debtor. See EQUITY, 4.

Of Equity Over Charitable Trusts. See TRUSTS, 13, 15, 17.

Of Equity to Vacate Decree—Code, § 381. See EQUITY, 10.

Of County Courts in Opening Highways. See COURTS, 3, 4.

Of County Courts to Construe Wills. See COURTS, 7.

Of County Courts Is Special and Limited. See COURTS, 6.

Of Circuit Court on Appeal Is Not Affected by Entries in Justice's Docket. See COURTS, 9, 10.

Of Circuit Court—Time for Filing Transcript on Appeal From Justice's Court. See COURTS, 11.

Of Supreme Court—Filing Printed Abstract. See APPEAL, 7.

Cannot Be Conferred on Supreme Court by Stipulation of the Parties. See SUPREME COURT, 4.

Curative Acts Are Inoperative to Supply Inherent Defects of Jurisdiction. See HIGHWAYS, 3.

Over Corporation—Service of Summons. See CORPORATIONS, 3.

JURY TRIAL.

Prejudice of Witness Is Proper to Be Considered. See TRIAL, 1.

Expression of Opinion by Trial Judge. See TRIAL, 6.

Misconduct of Jurors—Waiver of Right to Object. See TRIAL, 13.

Right of Jury to Fix Attorney's Fee in Note. See TRIAL, 7.

JUSTICE'S COURTS.

Supplying Omission in Record After Appeal. See APPEAL, 16, 18.

JUSTICE'S COURTS—CONCLUDED.

Justifying of Sureties on Appeal to Circuit Court on Objection by Respondent. See *APPEAL*, 17.

Appeal—Docket Showing Stay of Proceedings. See *APPEAL*, 18.

Time for Filing Transcript in Circuit Court. See *APPEAL*, 14.

JUSTIFICATION OF SURETIES

On Appeal From Justice's Court. See *APPEAL*, 17.

LACHES

In Presenting Check at Bank—Effect on Drawer When He Has No Funds. See *BILLS AND NOTES*, 4.

LANDLORD AND TENANT.

"ERECTIONS AND ADDITIONS" EXPLAINED.

1. Dynamos and other electrical machinery placed in a leased building for the purpose of furnishing power for an electric light system are not "erections or additions" to the leased premises, within the terms of the lease requiring erections and additions thereon to be surrendered with the premises to the landlord on the termination of the lease; that expression is limited to new buildings erected or additions made to old structures, and does not refer to chattels or trade fixtures brought onto the leased premises by the tenant.—*Liebe v. Nicolai*, 364.

RENT IN "MONTHLY PAYMENTS."

2. A clause in a lease requiring the rent to be paid "in monthly payments," the first to be made on the first day of the term, does not require payment in advance for each succeeding month; and a forfeiture of the lease cannot be declared by the lessor for a failure to pay in advance for a subsequent month.—*Liebe v. Nicolai*, 364.

ACTION FOR USE AND OCCUPATION.

3. An action for the use and occupation of real property must be supported by a contract of leasing, either express or implied.—*Holman v. DeLin*, 428.

RIGHTS GIVEN BY SECTIONS 2984 AND 2985, HILL'S CODE.

4. The provisions of sections 2984 and 2985, Hill's Code, do not create a right which gives rents, but prescribe a remedy, and relate to the recovery of rents when due, and must be based upon subsisting conventional relations.—*Holman v. DeLin*, 428.

ASSIGNMENT OF LEASE—CANCELLATION.

5. A lessee who has assigned his interest in the lease to his co-tenant cannot, by afterwards paying the rent to the end of the term, and taking an assignment to himself of the interest of the lessor, recover on the lease from his co-tenant, or a tenant of his co-tenant, the amount of rent so paid by him, as by such payment all obligations under the lease are discharged.—*Holman v. DeLin*, 428.

PRESUMPTION CONCERNING TENANT.

6. The occupant of premises for which there is an outstanding lease, if not the lessee himself or his assignee, is presumed to be a

LANDLORD AND TENANT—CONCLUDED.

sub-tenant in some degree of the original lessee.—*Holman v. DeLin*, 428.

LIABILITY OF SUB-TENANT FOR RENT.

7. A sub-tenant is not answerable to the original lessor for the rental, as there is neither privity of estate nor contract between them.—*Holman v. DeLin*, 428.

FORFEITURE OF LEASE BY BREACH OF CONDITION.

8. Breach of a condition in a lease against assigning or sub-leasing without permission of the lessor does not avoid the lease, except at the option of the lessor, shown by re-entry.—*Holman v. DeLin*, 428.

CHATTEL MORTGAGE ON CROP—FARM LEASE.

9. Under a lease stipulating that the crops raised on the demised premises shall be and remain the property of the landlord till the rent is fully paid, the title to the crops does not vest in the tenant till he has paid the rent, and the effect of such a provision is not to make the instrument a mortgage which must be filed to give it validity against subsequent mortgagees and purchasers in good faith. Under such circumstances, a chattel mortgage on the growing crops does not take precedence over the landlord's claim for rent, though the lease be unrecorded.—*Broders v. Bohannon*, 599.

LEASE.

"Future Erections and Additions" Defined. See LANDLORD AND TENANT, 1.

Terms of Forfeiture Clause Construed. See LANDLORD AND TENANT, 2.

Effect of Assignment of Lease to Co-tenant. See LANDLORD AND TENANT, 5.

Presumption Concerning Occupation Under a Lease. See LANDLORD AND TENANT, 6.

Forfeiture by Breach of Conditions. See LANDLORD AND TENANT, 8.

Farm Lease Reserving Title to Crops—Priority of Lien. See LANDLORD AND TENANT, 9.

LEGISLATIVE JOURNALS.

An enrolled act, signed by the proper officers, and filed in the office of the secretary of state, will be held to have been enacted as enrolled, though the legislative journals show that in its progress through the legislature an amendment was adopted which is not included in the enrolled act, as it will be presumed that the vote by which such amendment was adopted was reconsidered, and the amendment defeated. The rule adopted in this State is that when it appears from the legislative journals that the enrolled act on file with the secretary of state did not receive in either house the number of votes requisite for its passage, the act will be held invalid. This fact, however, must affirmatively be shown; mere silence of the records is not enough.—*McKinnon v. Cotner*, 588.

LEGISLATIVE POWER.

ESTABLISHING PUBLIC HIGHWAYS—NOTICE IS JURISDICTIONAL.

1. The legislature can prescribe the necessity and manner of taking private property for public use, but somewhere in the course of the proceeding there must be a notice to the owner of the property affected, otherwise the taking will be without "due process of law."—*Grady v. Dundon*, 333.

LIMIT OF SCOPE OF CURATIVE ACT.

2. A legislature may pass an act curing irregularities in proceedings, but it cannot declare valid acts which were originally void for lack of jurisdiction.—*Grady v. Dundon*, 333.

LICENSE.

Under section 3904, Hill's Code, providing that the board of pilot commissioners shall issue pilot licenses in such number as shall seem appropriate, and section 3907, directing that licenses so granted shall be annually renewed, unless for good cause, to be determined by the board, in which case the holder of a license shall be notified ten days before the expiration of his license, and shall be entitled to a hearing, the board cannot decline to renew a license once issued, except for cause, to be determined in the manner and after the notice required by the latter section. After a license is once issued, the right to a renewal thereof becomes, under the statutes cited, a vested and valuable right, of which the holder cannot be deprived without notice, on any ground whatever.—*Patterson v. Pilot Commissioners*, 301.

LIENS. See also MECHANICS' LIENS.

An attorney's lien does not attach to a judgment, or become binding on the judgment debtor, until the attorney has given notice of his lien to such debtor, and filed the original with the clerk of the court where the judgment was entered, as required by section 1044 of Hill's Code; so that if the debtor pays or settles the judgment before notice of the lien is served, the lien will not attach, regardless of whether the satisfaction has been entered or not.—*Day v. Larsen*, 247.

LIMITATION OF ACTIONS. Same as STATUTE OF LIMITATIONS.
LOCAL IMPROVEMENTS.

Municipal Power Is Special and Limited—Manner of Exercising. See STREETS, 1.

LOCAL AND SPECIAL LAWS.

For Opening and Working on Highways. See CONST. LAW, 1.

For Collecting County Taxes. See CONST. LAW, 4.

Regulating Practice in Courts of Justice. See CONST. LAW, 9.

LOCATION OF COUNTY ROADS.

Notice to Property Owner Is Necessary. See HIGHWAYS, 2.

Sufficiency of Description in Petition. See HIGHWAYS, 5.

MALICE.

On a trial for breach of a marriage promise, an unproved charge

MALICE—CONCLUDED.

of plaintiff's unchastity, made in the answer, may be considered in connection with all the rest of the evidence in aggravation of damages, as tending to show that defendant was actuated by malice.—*Osmun v. Winters*, 177.

MANDAMUS.**TO COMPEL PAYMENT OF ROAD TAX TO CITY.**

1. Under section 4085, subdivision 4, of Hill's Code, as amended (Laws 1893, p. 60), authorizing the county to levy and collect a road tax, and providing that the County Court shall apportion the amount collected among the road districts in the county, having due regard to the amount of taxes collected therein, to the condition of the roads, and the necessity for repairs, and to the amount of travel thereon, a city having the right to control the expenditure of its part of such funds cannot compel the county treasurer to pay the same to it till such apportionment is made.—*Oregon City v. Moore*, 215.

DIVISION OF ROAD TAX BY COUNTY COURT.

2. The right of a city to a portion of the road tax collected by county officials from its inhabitants cannot be determined by a mandamus proceeding against the county treasurer, where the law under which the tax was collected gives the County Court the power to determine the share belonging to the municipality, the remedy being by appeal from the award.—*Oregon City v. Moore*, 215.

3. Sections 6 and 7, of the act of February 21, 1893 (Laws 1893, p. 116), refer only to the collection and custody of taxes collected by county officers as agents of the municipality for which they were levied, and do not authorize a city to maintain mandamus against a county treasurer for a share of the road taxes collected under a general law, in the absence of an order from the County Court fixing the city's proportion of the fund, and ordering the county treasurer to pay it over.—*Oregon City v. Moore*, 215.

TO COMPEL SETTLEMENT OF BILL OF EXCEPTIONS.

4. Mandamus will not lie to compel a circuit judge to allow a bill of exceptions after failure of the appellant to present the same within the time allowed therefor, where the excuse for the delay is inability to obtain a copy of the official report from the stenographer, and a mistaken belief as to the time allowed for presenting the bill.—*McEwen v. Bradshaw*, 569.

MARRIAGE AND DIVORCE.

Cruel and Inhuman Treatment. See **DIVORCE**.

MATERIAL MEN, LIEN OF. Same as **MECHANICS' LIENS**.

MEASURE OF DAMAGES.

For Breach of Covenant to Pay Mortgage. See **DAMAGES**, 3. **MECHANICS' LIENS**.

REPAIRS AND OMISSIONS DISTINGUISHED.

1. Where a building has been, by the owner or his agent, accepted as completed in accordance with the requirements of the building

MECHANICS' LIENS—CONCLUDED.

contract, the renewing by the contractor of defects caused by inferior workmanship or material, discovered after the acceptance, is considered a repair rather than an omission, and the time for filing a lien will begin to run from the date when the building was accepted, and not from the date when the repairs were completed, though the rule may be otherwise where work required by the contract has been omitted.—*Avery v. Butler*, 287.

PROPERTY EXEMPT FROM EXECUTION.

2. Property exempt from sale on execution is not subject to mechanics' liens, unless the law conferring the special remedy so declares; thus, a bridge that is part of a public highway, not being liable to judicial sale, is not subject to mechanics' liens, and this though Hill's Code, § 3669, mentions bridges in the enumeration of property subject to such liens. In the absence of the word "public" the statute will be presumed to apply only to private bridges.—*Bank of Idaho v. Malheur County*, 420.

MECHANICS' LIENS ON PUBLIC BRIDGES.

3. No lien for material can attach to a county bridge, either before or after its acceptance, for, under sections 3669 and 3670, Hill's Code, the lien would attach to the land on which the bridge is constructed, and this, not being subject to execution (Hill's Code, § 282, subd. 6), is not subject to a lien. Furthermore, the bridge is public property, and exempt from mechanics' liens on grounds of public policy.—*Bank of Idaho v. Malheur County*, 420.

LIENABLE AND NON-LIENABLE ITEMS.

4. One employed on salary to do such work as may be required, and doing lienable and non-lienable work indiscriminately, is not entitled to a mechanic's lien, since the court cannot undertake from extrinsic evidence to apportion the salary between the lienable and non-lienable items.—*Getty v. Ames*, 573.

SUFFICIENCY OF NOTICE OF LIEN.

5. A claim of lien stating that claimants "have, by virtue of a special contract made with A. and T. in the construction of a certain building used as a dwelling and barn, constructed and being on the following described land;" * * * "that A. was the owner of the land, and T. had an interest therein, and joined in the contract;" "that the contract and reasonable price of such building" was a certain sum, with a statement of the account affixed, is clearly insufficient under section 3673 of Hill's Code, because it does not state directly or by necessary inference for whom the labor was done and material furnished, or that claimants had in fact performed any labor upon or furnished any material whatever for the building mentioned.—*Getty v. Ames*, 573.

MEMORANDUM Insufficient to Take a Contract Out of the Statute of Frauds. See STATUTE OF FRAUDS, 3.

MILEAGE.

Mileage, as such, except in the cases mentioned in the last clause of section 6, was abolished by the fee bill of 1895 (Laws 1895, p. 77).

MILEAGE—CONCLUDED.

and a sheriff traveling outside of his county to receive a prisoner is entitled to be reimbursed for only his actual necessary outlay.—*Brownfield v. Houser*, 535.

MISCONDUCT OF JURORS.

Waiver of Right to New Trial. See TRIAL, 13.

MISTAKE.

Ground for Reforming a Written Contract. See EQUITY, 5, 6.

MORTGAGES. See also CHATTEL MORTGAGES.**ASSUMPTION OF DEBT BY PURCHASER OF MORTGAGED PREMISES.**

1. An agreement by a purchaser of mortgaged premises to assume and pay the incumbrance, and to save the grantor harmless therefrom, is not a contract of indemnity only, but is an absolute undertaking to pay the mortgage debt when due, and if that is not done, there is an immediate right of action, whether the grantor has paid the debt or not.—*Haas v. Dudley*, 355.

DAMAGES FOR BREACH OF COVENANT TO PAY MORTGAGE.

2. Where part of a mortgaged tract is conveyed to grantees who covenant to pay the debt and save the mortgagor harmless therefrom, but the entire premises are afterward sold under the mortgage foreclosure, the measure of recovery on the broken covenant is what the reserved part of the tract was worth at the time of the foreclosure.—*Haas v. Dudley*, 355.

STATUTE OF LIMITATIONS—PAYMENT BY GRANTEE OF MORTGAGOR.

3. One who purchases mortgaged premises without assuming payment of the mortgage has no such interest after a sale of the premises on a covenant of warranty as will make a payment by him on the mortgage debt effective to remove the bar of the statute of limitations as against either the person liable for the debt or the owner of the land.—*Dundee Investment Company v. Horner*, 558.

4. The mere fact that the mortgagor's grantee is liable on his covenants of warranty does not make his payments effective to toll the statutes, either against the original debtor or the subsequent grantees.—*Dundee Investment Company v. Horner*, 558.

MOTION

In Supreme Court to Dismiss Criminal Appeal for Death of Defendant. See APPEAL, 1.

In Supreme Court to Dismiss Appeal for Failure to Serve Notice on Adverse Party. See APPEAL, 4, 5, 6.

In Supreme Court to Dismiss Appeal for Failure to Properly Describe Judgment. See APPEAL, 7.

In Supreme Court to Open Decree for Considering New Evidence Not Proper. See EQUITY, 10.

To Direct Verdict When Evidence Will Justify. See TRIAL, 11.

To Strike Out if Part of Testimony Is Competent. See TRIAL, 16.

MOTION—CONCLUDED.

To Strike Out Waived by Demur to Same Matter. See TRIAL, 15.

MUNICIPAL CORPORATIONS.**MUNICIPAL POWER TO MAKE STREET IMPROVEMENTS.**

1. The power of a city council in the matter of street improvements is a special one and must be exercised in strict conformity with the authority conferred; thus, where a city charter gives the council power to order a street improved whenever it shall be unsafe, the street must be unsafe in fact, or the improvement will not be binding on the property owners—the resolution of the council declaring the street dangerous is not conclusive on the courts.—*Smith v. Minto*, 351.

ESTOPPEL—LACK OF JURISDICTION.

2. Where a street improvement is undertaken without jurisdiction, the adjoining property owners are not estopped from resisting payment therefor by having failed to object while the work was in progress.—*Smith v. Minto*, 351.

DETERMINATION OF TIE VOTES.

3. A town charter providing that all laws regulating general elections shall govern elections under the charter does not impose on the town recorder the duty of determining tie votes by lot in town elections, in the manner prescribed for county clerks in county and precinct elections by section 2539 of Hill's Code, since the charter provides neither that the town recorder shall be substituted for the county clerk in the application of the statute to the town, nor that the method of determining ties in county elections shall be adopted, instead of the different method prescribed in legislative elections.—*Dunham v. Hyde*, 385.

LIMIT OF MUNICIPAL POWER OVER NUISANCES.

4. Under a charter giving to the city the power to prevent and restrain nuisances, and "to declare what shall constitute a nuisance," an ordinance absolutely prohibiting a railroad company from fencing its track in the platted portion of the city, and declaring such fence a nuisance, is void, since the city cannot assert a particular use of property to be a nuisance, unless such use comes within the common law or statutory idea of a nuisance, or is so in fact.—*Grossman v. City of Oakland*, 478.

MURDER.

Degrees of Guilt in Poisoning Cases. See CRIMINAL LAW, 1, 2.

MUTUALITY.

Unilateral Contract—Part Performance as a Consideration—Possession by Purchaser. See CONTRACTS, 1.

MUTUAL MISTAKE.

Ground for Reforming Written Contracts. See EQUITY, 5, 6.

NEGOTIABLE INSTRUMENTS. Same as BILLS AND NOTES.

NEW TRIAL.

Where defendant admitted that he owed part of the sum demanded, the judge very properly set aside a verdict in his favor, and granted a new trial.—*Jacobs v. Oren*, 593.

"NONE OF THE PARTIES" Defined. See WORDS AND PHRASES.
NON-RESIDENTS.

SERVICE OF SUMMONS IN TRANSITORY ACTIONS.

1. In transitory actions against non-residents, the plaintiff may lay the venue in any county he may select, and personal service on the defendant anywhere in the State will confer jurisdiction.—*Fratt v. Wilson*, 542.

2. The expression, "none of the parties reside in this State," found in section 44 of Hill's Code, refers to all non-resident defendants, whether they are found in the State or are absent therefrom.—*Fratt v. Wilson*, 542.

NOTICE.

Possession Is Notice of Possessor's Legal and Equitable Rights.
See VENDOR AND PURCHASER.

To Pilot of Intent Not to Renew License Is Required by Law.
See PILOTS AND PILOTAGE.

Of Intent to Open Road Is Jurisdictional. See HIGHWAYS, 2

To Corporate Stock Subscribers of First Stockholders' Meeting. See CORPORATIONS, 6, 7.

NOTICE OF APPEAL.

State Not an Adverse Party in Usury Case. See APPEAL, 4, 5.

County Is Adverse in Suit to Enjoin Tax Levy. See APPEAL, 6.

Description of Judgment Appealed From. See APPEAL, 7.

NUISANCE.

Under a charter giving to the city the power to prevent and restrain nuisances, and "to declare what shall constitute a nuisance," an ordinance absolutely prohibiting a railroad company from fencing its track in the platted portion of the city, and declaring such fence a nuisance, is void, since the city cannot assert a particular use of property to be a nuisance, unless such use comes within the common law or statutory idea of a nuisance, or is so in fact.—*Grossman v. City of Oakland*, 478.

OBJECTION

To Misconduct of Juror—May Be Waived. See TRIAL, 13.

Not Raised in Trial Court Is Waived. See TRIAL, 14.

OFFICIAL BONDS.

LIABILITY ON AN OFFICIAL BOND—ANNUAL OFFICE.

1. The principles and rules of law applicable to the responsibilities

OFFICIAL BONDS—CONCLUDED.

of sureties on public official bonds are the same, whether the term of the officer is annual or otherwise.—*Baker City v. Murphy*, 405.

LIABILITY FOR DEFAULT OF PUBLIC OFFICIAL HOLDING OVER.

2. The sureties on the official bond of a city treasurer, elected for one year under a city charter providing that he shall hold office until his successor is elected and qualified, are liable for defalcation of their principal after the expiration of the year, while holding over pending the election or appointment of his successor.—*Baker City v. Murphy*, 405.

OFFICER'S FEES. Same as **SHERIFFS**.

OFF-SET. Same as **SET-OFF AND COUNTERCLAIM**.

"OMISSION" and "Repair" Defined. See **MECHANIC'S LIENS. I.**

OPINION EVIDENCE. Same as **EVIDENCE, 14.**

OPTION TO PURCHASE.

Mutuality of Contract—Consideration. See **CONTRACTS, I.**

Time as a Necessary Element in an Option. See **CONTRACTS, 5.**

Waiver by Vendor of Condition Precedent. See **CONTRACTS, 3.**

Vendor Must Not Induce Purchaser to Break Contract. See **CONTRACTS, 4.**

Tender a Necessary Preliminary to Enforcing Specific Performance. See **CONTRACTS, 5, 6.**

OPTION TO SELL.

Consideration for Contract to Sell. See **CONTRACTS, I.**

Unilateral Contract—Part Performance. See **CONTRACTS, I.**

Time as the Essence of Contracts. See **CONTRACTS, 2.**

Waiver of Condition—Specific Performance. See **CONTRACTS, 3.**

Vendor Must Not Induce Vendee to Commit Breach of Conditions. See **CONTRACTS, 4.**

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OUSTER by Pleadings. See EJECTMENT, 6.

PAROL.

- Waiver of Terms of Insurance Policy. See INSURANCE, 3.
Trust in Proceeds of Real Property. See TRUSTS, 1.
Evidence to Show Trust Agreement. See EVIDENCE, 1.
Contract Concerning Land. See STATUTE OF FRAUDS, 3.
Contract to Sell Land—Performance by Vendee Affecting Statute of Frauds. See SPECIFIC PERFORMANCE, 1.
Evidence to Show Unsettled Account as Offset to Promissory Note. See EVIDENCE, 15.

PARTIES.

WAIVER OF DEFECT OF PARTIES—DEMURRER.

1. Where an objection for defect of parties is apparent on the face of the pleadings, the objection must be made by demurrer (section 71, Hill's Code), or it will be deemed waived.—*Cooper v. Thomson*, 162.

ADVERSE PARTY TO APPEAL.

2. The word "party," as used in section 537 of Hill's Code, providing that a notice of appeal must be served on every "adverse party," means only one who becomes identified with the case in some mode recognized by law, so as to be bound by the proceeding. Within the scope of this rule, the fact that a contract has been adjudged usurious, and the principal declared forfeited to the state for the use of the school fund, does not make the state a "party" to the proceeding so as to require notice of appeal to be served on it.—*Barger v. Taylor*, 228.

3. In a suit against a county and its treasurer and sheriff to restrain the levy of a tax to meet the payment of certain county warrants which are claimed to have been illegally issued, the county is an adverse party so as to require it to be served with the notice of appeal by the other defendants from a decree granting the injunction, for if the decree be modified or reversed, its liability to pay will certainly be affected.—*Stuller v. Baker County*, 294.

PART PAYMENT.

- Effect of on Existing Debts. See STATUTE OF LIMITATIONS, 3.

PART PERFORMANCE

As Avoiding Statute. See STATUTE OF FRAUDS, 3.

PAYMENT.

STATUTE OF LIMITATIONS—EFFECT OF PART PAYMENT.

1. Section 25, Hill's Code, providing that whenever a part payment is made on an existing debt the limitation shall commence from the date of the last payment, applies only to payments before the statute has run, and does not operate to revive a debt that has already expired.—*Dundee Investment Company v. Horner*, 558.

WHEN PART PAYMENT WILL NOT TOLL THE STATUTE.

2. A payment on a debt by a person who is in no way liable to the creditor, and who has no property interest to be protected against the enforcement of the debt, will not prevent the running of the statute of limitations in favor of the persons liable thereon, or on whose property it is a charge. This rule is not affected by section 25 of Hill's Code, providing that whenever any payment of principal or interest is made on an existing contract after the same becomes due, the limitation shall commence from the time the last payment is made.—*Dundee Investment Company v. Horner*, 558.

3. One who purchases mortgaged premises without assuming payment of the mortgage has no such interest after a sale of the premises on a covenant of warranty as will make a payment by him on the mortgage debt effective to remove the bar of the statute of limitations as against either the person liable for the debt or the owner of the land.—*Dundee Investment Company v. Horner*, 558.

STATUTE OF LIMITATIONS—PAYMENT BY GRANTEE OF MORTGAGOR.

4. The mere fact that the mortgagor's grantee is liable on his covenants of warranty does not make his payments effective to toll the statutes, either against the original debtor or the subsequent grantees.—*Dundee Investment Company v. Horner*, 558.

LIMITATION OF ACTIONS—EFFECT OF SECTION 24, HILL'S CODE.

5. The effect of any payment of principal or interest with regard to the running of the statute of limitations is not influenced by section 24 of Hill's Code, providing that no acknowledgment or promise shall be sufficient evidence of a new or continuing contract to take a case out of the operation of the statute, unless the same is in writing, signed by the party to be charged; this simply prescribes the character of evidence by which the acknowledgment or promise shall be proven, and in no wise affects the legal consequence of a part payment.—*Dundee Investment Company v. Horner*, 558.

PERPETUITIES, Rule Against. Same as WILLS, 7.

PILOTS AND PILOTAGE.

Under section 3904, Hill's Code, providing that the board of pilot commissioners shall issue pilot licenses in such number as shall seem appropriate, and section 3907, directing that licenses so granted shall be annually renewed, unless for good cause, to be determined by the board, in which case the holder of a license shall be notified ten days before the expiration of his license, and shall be entitled to a hearing,

PILOTS AND PILOTAGE—CONCLUDED.

the board cannot decline to renew a license once issued, except for cause, to be determined in the manner and after the notice required by the latter section. After a license is once issued, the right to a renewal thereof becomes, under the statutes cited, a vested and valuable right, of which the holder cannot be deprived without notice, on any ground whatever.—*Patterson v. Pilot Commissioners*, 301.

PLEADING.

PLEADING A JUDGMENT.

1. Allegations that a certain court was of competent jurisdiction, that a certain person commenced in such court an action against another certain person for the recovery of a certain sum, and recovered judgment for the amount demanded, are sufficient to show the existence of a valid judgment, which is prima facie evidence of the existence of a debt from the defendant to the plaintiff in such action.—*Fisher v. Kelly*, 1.

WILLINGNESS TO SPECIFICALLY PERFORM.

2. A plea that plaintiff stands "ready, willing and waiting to perform" is not a sufficient tender in a suit for specific performance of a contract; the offer should be to do all things and comply with all the conditions necessary to complete the acquisition of the right claimed.—*Clarno v. Grayson*, 112.

DEFECT OF PARTIES—DEMURRER.

3. Where an objection for defect of parties is apparent on the face of the pleadings, the objection must be made by demurrer (section 71, Hill's Code), or it will be deemed waived.—*Cooper v. Thomason*, 162.

AMENDMENT AT TRIAL—DISCRETION OF COURT.

4. Where a motion for leave to file an amended answer is called up the day before the time set for a second trial of the case, and the proposed amendment tenders a new issue, it is within the discretion of the court whether or not to allow the motion, and no abuse of such discretion seems to have occurred in this case.—*Osmun v. Winters*, 177.

5. In an action against an officer to recover damages for selling the property of plaintiff on an execution against another, where the answer merely denies plaintiff's ownership, it is within the discretion of the trial court, and is not a substantial change in the defense, under section 101 of Hill's Code, to permit defendant to amend during the trial by adding an allegation that plaintiff fraudulently took and held the property in question.—*Davis v. Hannon*, 192.

EJECTMENT—OUSTER BY PLEADING.

6. In an action by a tenant against his co-tenant to be admitted into possession, a denial in the answer of plaintiff's title and right of entry is an ouster.—*Grant v. Paddock*, 312.

DEFECTS CURED BY ANSWER.

7. In an action to recover the amount of a defalcation that occurred after the expiration of the regular term for which the official was elected, and while he was holding over, it perhaps ought to be

PLEADING—CONCLUDED.

alleged that the defaulter was not elected his own successor; but where the defendant answered without raising this point, the complaint will be held sufficient where it alleged that the defaulter's term expired on a certain day, but that he contested the election held on that day, and refused to surrender the office for a certain time during which he was a de facto officer.—*Baker City v. Murphy*, 406.

RIGHTS OF DEFENDANTS AGAINST EACH OTHER.

8. In a suit to determine plaintiff's rights to certain property, and to restrain defendants from interfering therewith, the rights of defendants, as between themselves, are not subject to determination, except so far as, between themselves, they have tendered and joined hostile issues.—*Nevada Ditch Company v. Bennett*, 59.

WAIVER OF MOTION BY DEMURRING.

9. A motion to strike out parts of an answer is waived by the subsequent filing and hearing of a demurrer thereto.—*Holman v. DeLin*, 428.

SUPPLEMENTAL PLEADINGS—CHANGE OF CONDITIONS.

10. Where, pending an appeal, the conditions and surroundings of one of the parties change so that a decree predicated on the facts existing at the time of trial will be inequitable, the cause should be remanded, to the end that supplemental pleadings may be filed and justice administered.—*Royal v. Royal*, 448.

PLEADING TENDER—COSTS.

11. A defendant desiring to avoid the payment of costs by virtue of a tender under section 561 of Hill's Code, must allege that before the commencement of the action he tendered to plaintiff an amount in satisfaction of his demand, and now brings the same into court and deposits it for plaintiff.—*Jacobs v. Oren*, 593.

PLEADING ESTOPPEL.

12. A party who has an opportunity to plead an estoppel upon which he relies, and fails to do so, but goes to issue on the fact, waives the estoppel and puts the matter at large, and the jury may disregard the estoppel, and are at liberty to find the truth.—*Nickum v. Burckhardt*, 464.

POISON.

Sections 1714, 1727 of the Code Construed. See CRIMINAL LAW, 1.

Death by Poison—Degree of Guilt. See CRIMINAL LAW, 2.

POSSESSION

As Constructive Notice to Purchaser of Legal and Equitable Rights of Possessor. See VENDOR AND PURCHASER, 5.

Of Office by Public Officer Holding Over. See CONST. LAW, 10.

PRACTICE IN CIVIL CASES.

Motion to Strike Out Testimony Partly Competent. See TRIAL, 16.

Demurrer Waives Motion to Strike Out. See TRIAL, 15.

PRACTICE IN CIVIL CASES—CONCLUDED.

- Stating Objection and Saving Exception. See **WAIVER**, 14.
- Referring Case Involving Long Accounts. See **TRIAL**, 8.
- Setting Aside Referee's Report in Law Actions. See **TRIAL**, 9.
- When Judge Ought Not to Direct a Verdict. See **TRIAL**, 11.
- Discretion as to Cross-Examining Witness. See **TRIAL**, 3, 4, 5.
- Showing Prejudice or Hostility of Witness. See **TRIAL**, 1, 2.
- Amending Pleadings During Trial. See **TRIAL**, 17, 18.
- Practice in Amending Returns on Writs. See **TRIAL**, 19.
- Discretion of Court in Settling Bills of Exceptions. See **TRIAL**, 20, 21.
- Justification of Sureties at Request of Respondent—Appeal From Justice's Court. See **APPEAL**, 17.

PRACTICE IN CRIMINAL CASES.

- Expression of Opinion by Trial Judge. See **TRIAL**, 6.
- Discretion of Trial Court as to Changing Venue. See **TRIAL**, 10.
- When Court Should Refuse to Direct a Verdict. See **TRIAL**, 11.

PRACTICE IN PROBATE CASES.

- Will Appointing Executor Is Entitled to Probate. See **WILLS**, 1.
- Proceeding to Secure Construction of a Will. See **WILLS**, 3.
- Probating Will Partially Void. See **WILLS**, 5.
- Petition of Executor for Instructions. See **WILLS**, 6.

PRACTICE IN SUPREME COURT.

- Appeal in Equity Case From Decree Sustaining Demurrer for Failure to State Cause of Suit—Disposition of Cause. See **SUPREME COURT**, 2.
- Jurisdiction by Filing Printed Abstract. See **SUPREME COURT**, 7.
- Party Not Appealing Is Presumably Satisfied With Result. See **SUPREME COURT**, 10.
- Dismissing Appeal—Notice to Adverse Party. See **APPEAL**, 4, 5, 6.
- Dismissing Appeal—Description of Judgment. See **APPEAL**, 7.
- Terms of Supreme Court—Appeals From Certain Counties. See **SUPREME COURT**, 4.
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PREFERENCES AMONG CREDITORS.

- Statutory Prohibition of Preferences in General Assignments. See **INSOLVENTS**, 2.
- Right of Failing or Insolvent Debtor to Dispose of Property. See **INSOLVENTS**, 2.

PRESUMPTIONS

FROM POSSESSION OF STOLEN PROPERTY.

1. The possession of stolen property does not raise any legal presumption of guilt, but its only effect is to afford ground for an inference or conclusion in the minds of the jury.—*State v. Pomeroy*, 16.

FROM FAILURE TO APPEAL.

2. A party who does not appeal from a judgment or decree is presumably satisfied, and his interests will not be considered by the reviewing authority.—*Cooper v. Thomason*, 162.

PRESUMPTION AS TO SCOPE OF AGENCY.

3. The presumption is that an agency comprehends the doing of only lawful things, and the law will always assume that an illegal act, as, for example, accepting usury, was done without the principal's authority or consent.—*Barger v. Taylor*, 228.

NEGOTIABLE INSTRUMENT.

4. In support of a judgment, an instrument alleged to be a sight draft, drawn by an individual on a bank, will be presumed to be an ordinary bank check.—*First National Bank v. Linn County Bank*, 296.

SUFFICIENCY OF TESTIMONY.

5. Alleged error in overruling a motion for a new trial on the ground that the verdict was against law will not be considered by the Supreme Court, where the bill of exceptions does not contain or purport to contain all the evidence given on the trial, or all the instructions of the court.—*First National Bank v. Linn County Bank*, 296.

PRESUMPTION OF SURVIVORSHIP.

6. A conclusion of law that the share of one of several joint heirs capable of making a will descended on his death to the survivors, is not supported, in the absence of a finding that he died intestate, or that he did not leave a widow, child, or parent surviving.—*Grant v. Pad-dock*, 312.

FROM GIVING OF NOTE.

7. There is a presumption that by giving a promissory note all the antecedent demands existing between the parties have been considered and adjusted, and that the amount expressed is the balance due the payee.—*Williams v. Culver*, 375.

CONCERNING TENANT.

8. The occupant of premises for which there is an outstanding lease, if not the lessee himself or his assignee, is presumed to be a sub-tenant in some degree of the original lessee.—*Holman v. DeLin*, 428.

FROM POSSESSION OF NOTE.

9. The possession of a promissory note and its production on the trial by a prior indorsee raises a presumption which establishes prima facie his legal title to the note, although the same bears an indorsement by him in full to another.—*Spreckels v. Bender*, 577.

ENACTMENT OF STATUTES—LEGISLATIVE JOURNALS.

10. An enrolled act, signed by the proper officers, and filed in the

PRESUMPTIONS—CONCLUDED.

office of the secretary of state, will be held to have been enacted as enrolled, though the legislative journals show that in its progress through the legislature an amendment was adopted which is not included in the enrolled act, as it will be presumed that the vote by which such amendment was adopted was reconsidered, and the amendment defeated.—*McKinnon v. Cotner*, 588.

PRINCIPAL AND AGENT. Same as AGENTS AND AGENCY.

PRIVATE CITIZEN.

Suit to Enjoin Creation of Illegal Debt. See EQUITY, 11, 12.

PROBATE.

Will Appointing Executor Entitled to Probate. See EXECUTORS, 1.

Will Partly Void Is Entitled to Probate. See EXECUTORS, 2.

PROCESS.

Personal Service in Transitory Action on Non-Resident Who Is Temporarily Within This State. See SUMMONS, 1, 2.

PROMISSORY NOTES. Same as BILLS AND NOTES.

PROOFS OF LOSS.

Objections Must Be Definitely Stated. See INSURANCE, 1, 2.

PUBLIC HIGHWAYS. Same as HIGHWAYS.

PUBLIC IMPROVEMENTS. Same as STREETS.

PUBLIC LANDS.

APPROPRIATION OF WATERS BY GOVERNMENT ON PUBLIC LANDS.

1. Non-navigable streams upon the public domain, not appropriated by the methods cognizant to law, are as much the property of the government as the lands through which they flow, and may be taken and used by the government without any of the steps required of private citizens; but such rights cease whenever the land passes to a private individual or is restored to the public domain, unless there is a special grant continuing the government rights to the grantee.—*Nevada Ditch Company v. Bennett*, 61.

WHEN WATER RIGHT IS NOT APPURTENANT TO PUBLIC LANDS.

2. A public use of water from a public stream by the government does not become appurtenant to the soil, so as to pass with it in a grant to private individuals, so as to give the patentee a right of appropriation superior to that of one who perfected an appropriation before the issuance of the patent, but after the diversion of the water by the government.—*Nevada Ditch Company v. Bennett*, 61.

3. Even if the public use of water, made by the government upon the public domain, would pass as appurtenant to the land under an ordinary patent, so as to render the rights of the patentee superior to those of one who had perfected an appropriation before the issuing of the patent, such rights would not pass under a patent in which the grant is expressly made subject to vested and accrued water rights.—*Nevada Ditch Company v. Bennett*, 61.

PUBLIC OFFICIAL.

Liability of Sureties on Bonds of Public Officials Holding Over After Term. See **OFFICIAL BONDS**, 1, 2.

Tenure of Office. See **CONSTITUTIONAL LAW**, 31.

PUBLIC POLICY.

A bridge forming part of a public highway is not subject to mechanics' liens for reasons of public policy.—*Baker & Lewis v. Mulheir County*, 420.

PUBLIC ROADS. Same as **HIGHWAYS**.

PUBLIC STREETS. Same as **STREETS**.

PUBLIC USE. Same as **EMINENT DOMAIN**.

RAILROAD SUBSIDY.

Dependent and Independent Covenants in Subsidy Contract. See **CONTRACTS**, 11, 12.

Speculative Damages for Breach of Subsidy Agreement Are Not Recoverable. See **CONTRACTS**, 4.

Recovery of Installment Paid—Failure of Consideration. See **CONTRACTS**, 11, 12.

Consideration for Note—Modification of Contract Agreement. See **CONTRACTS**, 12.

REAL ESTATE BROKERS. Same as **BROKERS**.

REAL PROPERTY.

Possession as Notice to Purchaser of Latent Rights. See **VENDOR AND PURCHASER**, 5.

Estate at Law Transferred by an Agreement to Sell. See **BOND FOR DEED**, 1.

Equitable Estate Conveyed by a Bond for a Deed. See **BOND FOR DEED**, 1.

Construction of a Broker's Contract. See **BROKERS**, 2.

Computing Time of Statute. See **STATUTE OF LIMITATIONS**, 1, 2.

RECOUPMENT. Same as **SET-OFF**.

REFEREE.

RIGHT OF COURT TO REFER CAUSE—EXAMINATION OF ACCOUNTS.

1. The Circuit Court of Multnomah County, if a case before it involves the examination of long and complicated accounts, may, without the consent of the parties, refer it to a referee; and, where one branch of a case requires twenty-six pages of account for its statement, the reference is justified.—*Craig v. California Vineyard Company*, 43.

EFFECT OF SETTING ASIDE REPORT OF REFEREE.

2. A trial court, in an action at law, has the same control over a

REFEREE—CONCLUDED.

report of a referee that it has over the verdict of a jury, and its power to set aside such report extends to all the causes prescribed by statute for setting aside the verdict of a jury; and, where a trial court sets aside the report of a referee, in an action at law, and makes new findings, under section 229 of Hill's Code, providing that in such case the court may make another reference, or "may find the facts and determine the law itself," its findings of fact, though based on the evidence reported by the referee, are entitled to every presumption in their favor that would arise if made on an original trial by the court, and will not be reviewed on appeal when supported by any evidence.—*Liebe v. Nicolai*, 365.

REFORMATION OF WRITTEN INSTRUMENTS.

MUTUAL MISTAKE—NEGLECT.

1. Equity will not reform a written contract on the ground of mistake unless the party asking reformation shows clearly, not only that the alleged mistake exists, but that it was mutual, and was not caused by his negligence.—*Mitchell v. Holman*, 280.

BELIEF AS TO LEGAL EFFECT OF LANGUAGE USED.

2. That the legal effect of the language used in a contract is different from what one of the parties supposed it to be is not a ground for relief from the contract, or for reforming it, after one party has executed his part.—*Mitchell v. Holman*, 280.

REHEARING Before Supreme Court. See **SUPREME COURT**, 8.

REPAIRS Distinguished From "Omissions." See **MECH. LIENS**, 1.

REPLEVIN.

Where an insolvent orders large quantities of goods in anticipation of failure, for the purpose of surrendering them to a preferred creditor, and such goods are thereafter fraudulently attached by such creditor, the vendors of the property thus obtained may rescind the sales, and bring replevin to recover possession of their respective goods.—*Craig v. California Vineyard Company*, 43.

RES GESTAE.

Where the acts of an agent are binding on the principal, what was said by the agent at the time is admissible as part of the res gestae; but where the declarations do not accompany the act, they are not admissible to charge the principal.—*First National Bank v. Linn County Bank*, 296.

RESULTING TRUST Defined and Distinguished. See **TRUSTS**, 3.

RETURNS OF OFFICERS.

Certificate Should State Only Official Acts. See **EXECUTIONS**, 4.

Practice in Allowing Officers to Amend Returns Should Be Liberal. See **TRIAL**, 19.

REVENUE BILLS.

A constitutional provision that acts for raising revenue must have their origin in the lower branch of the legislature does not apply to a law providing for the exaction of certain fees from parties to legal proceedings, although these are turned into the treasury and the officers paid by salary. Such a law gives to the person who pays the fees something in return other than is enjoyed by the community at large, and which the person may take or not, at his option; these are not acts for raising revenue.—*Northern Counties Trust v. Sears*, 388.

REVIEW. Same as BILL OF REVIEW.

REVIVAL OF DEBT.

Part Payment Does Not Revive Extinct Debt. See STATUTE OF LIMITATIONS, 2.

ROADS.

Notice of Intention to Open Is Indispensable. See HIGHWAYS, 2.

Public Right May Be Lost by Adverse Possession for Statutory Period. See HIGHWAYS, 4.

Example of Insufficient Description in Petition. See HIGHWAYS, 5.

ROAD TAXES.

Section 485, Hill's Code, Relating to Road Taxes, Is Constitutional. See TAXES, 3.

Right of City to Road Taxes—Apportionment of Tax by County Court. See TAXES, 4, 5, 6.

RULES OF COURT.

RULE 4—CONTENTS OF PRINTED ABSTRACT.

The requirement of Rule 4 of the Supreme Court (24 Or. 595; 37 Pac. 6) that there shall be printed so much of the record as may be necessary to a full understanding of the questions presented for decision is satisfied by setting out such parts of the pleadings and orders as show the contested points. It may not be necessary to print the entire pleadings.—*Cox v. Alexander*, 443.

RULE 13—ABSTRACT INSTEAD OF TRANSCRIPT.

Where the parties have stipulated that the printed abstract may stand in place of the transcript (Rule 13, 24 Or. 595; 37 Pac. 6), and the agreement has been complied with, the court will not permit one of them to afterward object to the jurisdiction for want of a transcript.—*Fratt v. Wilson*, 542.

SERVICE OF NOTICE OF APPEAL.

State Not an Adverse Party in Usury Cases. See APPEAL, 4, 5.

Who Are Adverse Parties to an Appeal Necessary to Be Served With Notice. See APPEAL, 4, 5, 6.

SERVICE OF SUMMONS

On Principal Officer of Corporation at Home Office Confers Jurisdiction. See SUMMONS, 1.

SERVICE OF SUMMONS—CONCLUDED.

Within This State on Non-Resident Defendant in Transitory Action. See SUMMONS, 2.

SESSION LAWS Considered in this volume:—

Laws 1870, p. 67, Grady v. Dundon, 334.

Laws 1885, p. 61, State v. Stockman, 39.

Laws 1891 $\left\{ \begin{array}{l} \text{p. 823} \\ \text{p. 824} \\ \text{p. 828} \end{array} \right.$ Smith v. Minto, 352.

Laws 1893 $\left\{ \begin{array}{l} \text{p. 26, Craig v. California Vineyard Company, 50, 51.} \\ \text{p. 60, Oregon City v. Moore, 215.} \\ \text{p. 93, McKinnon v. Cotner, 588.} \\ \text{p. 163, Northern Counties Trust v. Sears, 388, 389.} \end{array} \right.$

Laws 1895, p. 77 $\left\{ \begin{array}{l} \text{Northern Counties Trust v. Sears, 388.} \\ \text{Houser v. Umatilla County, 486.} \\ \text{Brownfield v. Houser, 534, 535.} \end{array} \right.$

SET-OFF AND COUNTERCLAIM.

SET-OFF AGAINST INSOLVENT JUDGMENT DEBTOR.

1. Equity will entertain a suit to compel the allowance of a set-off against a judgment on a note obtained by one who held it only as collateral for a debt less than such note, where this latter fact was not known to the maker until the trial of the law action (and so was not pleaded), and the payee is insolvent—*Mitchell v. Holman*, 280.

OFFSET AGAINST SHERIFF'S CLAIM.

2. In a suit by a taxpayer to enjoin the county clerk from issuing to the sheriff a warrant for a claim allowed by the County Court, payments theretofore made by the county to the sheriff cannot be inquired into, or offset against the portion of his account conceded to be valid.—*Brownfield v. Houser*, 535.

REMOTE AND SPECULATIVE DAMAGES AS SET-OFF.

3. The loss of anticipated profits from the additional value which would have been conferred upon town lots by the construction of a railroad to the town in accordance with a subsidy contract is too remote and speculative to be available as a recoupment or set-off in an action by the company upon the contract.—*Coos Bay Railroad Company v. Nosler*, 547.

SHERIFFS.

STATUTORY CONSTRUCTION—FEES OF SHERIFFS.

1. Since the act of 1893 (Laws 1893, p. 163), as amended in 1895 (Laws 1895, p. 77), the sheriffs throughout the State are not entitled to collect fees except as in that statute provided.—*Northern Counties Trust v. Sears*, 388.

EXPENSES OF TRAVEL—SALARY.

2. Under the language and intent of the act of 1895 fixing the

SHERIFFS—CONCLUDED.

compensation of sheriffs and other county officers (Laws 1895, p. 77), a sheriff cannot claim from his county the expenses of travel within his jurisdiction while serving processes of the state in criminal cases.—*Houser v. Umatilla County*, 486.

“EXPENSE ACCOUNTS” OF SHERIFFS—ITEMIZED BILL.

3. Section 6 of the act of 1895 (Laws 1895, p. 81), precludes a sheriff from being reimbursed by a county for any expense that he may incur in the course of traveling on official business within his county, and for mileage, as such, while traveling without the county to receive a prisoner already in custody. When a claim for expenses is made under this latter clause, it must be in the form of a detailed account, accompanied by the proper proofs, so that the auditing officer can determine whether each item was an actual expense necessarily incurred.—*Brownfield v. Houser*, 534.

EXPENSES OF SHERIFF—MILEAGE.

4. Mileage, as such, except in the cases mentioned in the last clause of section 6, was abolished by the fee bill of 1895 (Laws 1895, p. 77), and a sheriff traveling outside of his county to receive a prisoner is entitled to be reimbursed for only his actual necessary outlay.—*Brownfield v. Houser*, 535.

OFFSET AGAINST SHERIFF'S ACCOUNT.

5. In a suit by a taxpayer to enjoin the county clerk from issuing to the sheriff a warrant for a claim allowed by the County Court, payments theretofore made by the county to the sheriff cannot be inquired into, or offset against the portion of his account conceded to be valid.—*Brownfield v. Houser*, 535.

PROTECTION OF SHERIFF—LEVYING EXECUTION.

6. Where a sheriff has levied on goods of a judgment debtor, under an execution regular on its face, and issued out of a court of competent jurisdiction, he is protected by the writ; and evidence to charge him with knowledge that the judgment on which the execution was based had in fact been paid is inadmissible against him in an action for illegal seizure.—*Barr v. Combs*, 29 Or. 399.

SHERIFF'S RETURN ON EXECUTION.

7. It is a sheriff's duty in his return to certify only to the acts performed by him in his official capacity in the levy of an execution; and his certificate as to some agreement between the parties, of which he may have had knowledge, is not admissible against either of them.—*Barr v. Combs*, 29 Or. 399.

SPECIAL LAWS

For Laying, Opening, and Working on Public Highways.
See CONSTITUTIONAL LAW, 1.

For Assessment and Collection of Taxes for Road Purposes.
See CONSTITUTIONAL LAW, 1.

For Assessment and Collection of County and Township Taxes.
See CONSTITUTIONAL LAW, 3, 4.

Regulating Charges and Practise in Courts of Justice. See
CONSTITUTIONAL LAW, 9.

SPECIFIC PERFORMANCE.

CONSIDERATION FOR UNILATERAL CONTRACT.

1. Entering into possession of a mine by an intending purchaser and the expending of money and labor in operating and developing it under the terms of an option to purchase constitute a sufficient consideration to support the option, and render it irrevocable within the time limited for completing the purchase, and it is no objection that the option is unilateral.—*Clarno v. Grayson*, 111.

TIME AS A NECESSARY ELEMENT IN AN OPTION.

2. It would seem that if a given condition is a prerequisite to the acquirement of a right to the subject-matter of a contract, time ought to be considered of the essence of such a contract, if the performance of the condition is a matter optional with the purchaser, and the contract has been fairly entered into with a view to accord an option only.—*Clarno v. Grayson*, 111.

WAIVER OF CONDITION PRECEDENT.

3. Acts or declarations on the part of the owner which amount to a rescission or repudiation of an option for the purchase of land, and an absolute and positive denial of any and all duties under it, may render unnecessary strict performance by the purchaser before suit to secure specific performance, upon the ground that it would be a useless and vain thing to tender the stipulated performance, knowing that it would not be accepted.—*Clarno v. Grayson*, 111.

SPECIFIC PERFORMANCE OF OPTION BY GRANTOR.

4. An owner of land who would insist upon strict performance by a prospective purchaser as a condition precedent to an action by the latter for the specific performance of an option to purchase must not himself be the cause of the breach.—*Clarno v. Grayson*, 111.

CONDUCT EXCUSING TENDER.

5. Where the giver of an option on real estate enters and takes possession of the property before the expiration of the time limited in the option, and in violation of its terms, his conduct will not be considered such a repudiation of the option as to excuse a tender under the provisions of the contract, where it is mutually understood that the holders of the option may complete the purchase as stipulated; such conduct by the maker of the contract may excuse punctuality of performance, but will not excuse performance entirely.—*Clarno v. Grayson*, 111.

6. The giver of an option to purchase real estate took possession of the premises in violation of the option he had given, and during his holding derived a profit from it. The holder of the option sued for specific performance, but made no tender of the purchase price, claiming that the defendant had made more profit during his wrongful possession than the amount due on the bond. *Held*, that in the absence of an accounting, or a refusal to account, the purchase price must be tendered as a condition precedent.—*Clarno v. Grayson*, 112.

PLEADING WILLINGNESS TO PERFORM.

7. In a suit to enforce the terms of a contract to sell, an allegation that plaintiff stands "ready, willing and waiting to perform" is insuffi-

SPECIFIC PERFORMANCE—CONCLUDED.

cient; the tender should be to do all things and comply with all the conditions necessary to complete the acquisition of the rights claimed.—*Clarno v. Grayson*, 112.

EQUITY JURISDICTION TO DECREE—SPECIFIC PERFORMANCE.

8. In a suit for specific performance by the holder of an option to purchase a mine in operation an equity court cannot decree that plaintiff be put in possession and that the time for purchasing be extended for a period equal to the time the property has been withheld by the wrongful act of the vendor, because it would be making a new and different contract, and because it would require a protracted supervision over a complicated and technical matter.—*Clarno v. Grayson*, 112.

POSSESSION BY VENDEE.

9. The vendor in a parol contract for the sale of lands may enforce specific performance thereof, where he has delivered possession to the purchaser, who has made improvements entitling him to the enforcement of the contract as against the vendor.—*Cooper v. Thomason*, 162.

SPECIFICATION OF ERRORS.

Excessive Damages to Be Available Must Be Stated in the Notice of Appeal. See APPEAL, 3.

Sufficiency of Statement of Errors in Petition for Writ of Review. See WRIT OF REVIEW, 5.

SPECULATIVE DAMAGES

Are Not Recoverable. See CONTRACTS, 4.

STATE CONSTITUTION.

Article I { Sec. 10, Northern Counties Trust v. Sears, 389.
Sec. 17, Cox v. Alexander, 438.
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Sec. 23, Brownfield v. Houser, 534.
Subd. 10, Northern Counties Trust v. Sears, 397.

Oregon City v. Moore, 215.

Article XV, Sec. 1, Baker City v. Murphy, 412.

STATUTE OF FRAUDS.

PAROL TRUST IN PROCEEDS OF REAL ESTATE.

1. Though a trust in real estate cannot be created by parol, the same rule does not apply to personal property; and if a grantee sells land under a parol agreement to convert it into money and pay the

STATUTE OF FRAUDS—CONCLUDED.

grantor's debts, his subsequent acknowledgment of the trust will bind him.—*Cooper v. Thomason*, 161.

PAROL EVIDENCE—EXPRESS TRUST.

2. In a suit to enforce a trust in personal property which is the proceeds of land held in trust, parol evidence is admissible to prove the original agreement under which the premises were held, as a consideration for a subsequent declaration of the trust by the trustee.—*Cooper v. Thomason*, 162.

CONTRACT CONCERNING LAND—PART PERFORMANCE.

3. A deed deposited in escrow is insufficient to take an oral contract for the sale of land out of the statute of frauds, unless such deed contains a memorandum of the agreement; nor is payment of the purchase price such a part performance as to overcome the plea of the statute; but taking possession in pursuance of the terms of the contract, and making improvements, is sufficient for that purpose.—*Cooper v. Thomason*, 162.

STATUTE OF LIMITATIONS.

RULE FOR COMPUTING TIME.

1. In computing the time limited by section 4 of Hill's Code of Oregon for bringing action to recover possession of real property, the day on which the cause of action accrued should be excluded, since the rule prescribed by section 519 of the Code (i. e., that the time within which an act is to be done shall be computed by excluding the first day and including the last) applies to all computations of time.—*Grant v. Paddock*, 312.

SECTION 24 OF HILL'S CODE AS A RULE OF EVIDENCE.

2. The effect of any payment of principal or interest with regard to the running of the statute of limitations is not influenced by section 24 of Hill's Code, providing that no acknowledgment or promise shall be sufficient evidence of a new or continuing contract to take a case out of the operation of the statute, unless the same is in writing, signed by the party to be charged; this simply prescribes the character of evidence by which the acknowledgment or promise shall be proven, and in no wise affects the legal consequence of a part payment.—*Dundee Investment Company v. Horner*, 558.

EFFECT OF PART PAYMENT.

3. Section 25, Hill's Code, providing that whenever a part payment is made on an existing debt the limitation shall commence from the date of the last payment, applies only to payments before the statute has run, and does not operate to revive a debt that has already expired.—*Dundee Investment Company v. Horner*, 558.

WHEN PART PAYMENT WILL NOT TOLL THE STATUTE.

4. A payment on a debt by a person who is in no way liable to the creditor, and who has no property interest to be protected against the enforcement of the debt, will not prevent the running of the statute of limitations in favor of the persons liable thereon, or on whose property it is a charge. This rule is not affected by section 25 of Hill's Code, providing that whenever any payment of principal or interest is

STATUTE OF LIMITATIONS—CONCLUDED.

made on an existing contract after the same becomes due, the limitation shall commence from the time the last payment is made.—*Dundee Investment Company v. Horner*, 558.

5. One who purchases mortgaged premises without assuming payment of the mortgage has no such interest after a sale of the premises on a covenant of warranty as will make a payment by him on the mortgage debt effective to remove the bar of the statute of limitations as against either the person liable for the debt or the owner of the land.—*Dundee Investment Company v. Horner*, 558.

PAYMENT BY GRANTEE OF MORTGAGOR.

6. The mere fact that the mortgagor's grantee is liable on his covenants of warranty does not make his payments effective to toll the statutes, either against the original debtor or the subsequent grantees.—*Dundee Investment Company v. Horner*, 558.

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- 24, Dundee Investment Company v. Horner, 558.
- 25,
- 38, State v. Martin, 110.
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- 235, Liebe v. Nicolai, 372.
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- 764, { Munkers v. Farmers' Insurance Company, 211.
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- 765, { Subdivision 15, Bank of Idaho v. Malheur County, 425.

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STATUTES AND STATUTORY CONSTRUCTION.

SALARY ACT IS OF GENERAL APPLICATION.

1. A statute intended to apply to all the counties of a state, which provides for specified salaries of clerks and sheriffs of all counties in existence when it was introduced in the legislature, and states that these are in lieu of fees previously chargeable, is not rendered special or local, in violation of article IV, § 23, subd. 10, of the State constitution, by failing to provide any salary for those officers in a certain county which was created after the introduction of the bill, but the officers in that county are subject to the law although their salary is not fixed by it.—*Northern Counties Trust v. Sears*, 388.

2. The act of February 22, 1893 (Laws 1893, p. 163), which was introduced seven days before, but became a law two days after, the act creating Lincoln County, and which provides that "each of the county clerks of the several counties in this State in which there exists such office shall receive a salary as follows"; that "the sheriffs of the several counties in this State shall receive an annual salary as follows"; that "it shall be the duty of the several clerks of the Circuit and County Courts of this State," etc.—is a general law, the provisions of which the clerk and sheriff of Lincoln County are bound to observe. It is evident from the terms used in the act and from a consideration of the circumstances surrounding its introduction and passage (all which may be considered where the language used is ambiguous or of doubtful import) that this act was intended to be applied to every county in the State.—*Northern Counties Trust v. Sears*, 388.

FEES OF SHERIFFS.

3. Since the act of 1893 (Laws 1893, p. 163), as amended in 1895 (Laws 1895, p. 77), the sheriffs throughout the State are not entitled to collect fees except as in that statute provided.—*Northern Counties Trust v. Sears*, 388.

ENACTMENT OF STATUTES—LEGISLATIVE JOURNALS—PRESUMPTION.

4. An enrolled act, signed by the proper officers, and filed in the office of the secretary of state, will be held to have been enacted as enrolled, though the legislative journals show that in its progress through the legislature an amendment was adopted which is not included in the enrolled act, as it will be presumed that the vote by which such amendment was adopted was reconsidered, and the amendment defeated. The rule adopted in this State is that when it appears from the legislative journals that the enrolled act on file with the secretary of state did not receive in either house the number of votes requisite for its passage, the act will be held invalid. This fact, however, must affirmatively be shown; mere silence of the records is not enough.—*McKinnon v. Colner*, 588.

STOCK SUBSCRIBERS.

WHO ARE STOCK SUBSCRIBERS.

1. One who has signed a preliminary subscription to the capital stock of a corporation, and has signed the consent agreement for the first meeting of stockholders, and actually participated in such meeting, is a stock subscriber, though he has not signed the stock subscription book after the filing of the articles of incorporation.—*Nickum v. Burckhardt*, 464.

CHANGING OBJECTS OF CORPORATION—VALIDITY OF ORGANIZATION.

2. A subscriber to the stock of a corporation cannot avoid liability upon his subscription on the ground that the purposes designated in the articles of incorporation do not correspond with those set forth in the preliminary subscription, where he participated in the organization under such articles.—*Nickum v. Burckhardt*, 465.

NOTICE TO SUBSCRIBERS.

3. Subscribers who were present and participated in the first meeting of the stockholders of a corporation cannot object that the organization was illegal because certain other subscribers, whose presence was not necessary to make up the requisite representation of half the capital stock, were not notified of the meeting as required by law.—*Nickum v. Burckhardt*, 465.

4. One who subscribes to the capital stock of a corporation after its apparent organization cannot avoid liability therefor because certain preliminary subscribers, whose presence was not necessary to make up one-half the capital stock required to be represented, were not notified of the first meeting of the corporation.—*Nickum v. Burckhardt*, 465.

PRIVITY BETWEEN CORPORATIONS AND STOCKHOLDERS.

5. A stockholder and his corporation are in privity as to an adjudication against the corporation in matters pertaining to duties it owes its members; but when the corporation sues a delinquent member for his stock subscription, it cannot be said to represent any shareholder, so as to bind him by the result, for it is apparent that in such a case the corporation and the stock subscriber are strictly adversary.—*Nickum v. Burckhardt*, 465.

6. A judgment for defendant in an action by a receiver of a corporation against an alleged stock subscriber, involving the sole issue whether or not he was a subscriber at the date of the attempted organization, is not available as an estoppel against the receiver in a subsequent action to recover an unpaid subscription from another alleged stockholder—in other words, the action of the corporation was against the stockholder sued, and not in defense of his rights or interests, and binds only the parties to it.—*Nickum v. Burckhardt*, 465.

STORAGE. Same as WAREHOUSE.

STREETS AND STREET IMPROVEMENTS.

MUNICIPAL POWER TO MAKE STREET IMPROVEMENTS.

1. The power of a city council in the matter of street improvements is a special one and must be exercised in strict conformity with the authority conferred; thus, where a city charter gives the

STREETS AND STREET IMPROVEMENTS—CONCLUDED.

council power to order a street improved whenever it shall be unsafe, the street must be unsafe in fact, or the improvement will not be binding on the property owners—the resolution of the council declaring the street dangerous is not conclusive on the courts.—*Smith v. Minto*, 351.

ESTOPPEL—LACK OF JURISDICTION.

2. Where a street improvement is undertaken without jurisdiction, the adjoining property owners are not estopped from resisting payment therefor by having failed to object while the work was in progress.—*Smith v. Minto*, 351.

SUBROGATION.

County Courts cannot pay off or take assignments of claims against creditors of the county, so as to succeed to the rights of such creditors.—*Bank of Idaho v. Malheur County*, 420.

SUBSIDY CONTRACTS.

Independent and Dependent Covenants Considered and Explained. See CONTRACTS, 11, 12.

Breach—Loss of Expected Profits. See CONTRACTS, 4.

Partial Failure to Complete—Recovery of Installment Paid. See CONTRACTS, 11.

Modification of Agreement. See CONTRACTS, 2.

SUMMONS.

SERVICE OF PROCESS ON CORPORATION.

1. Service of summons on one of the principal officers of a private corporation at its principal office or place of business gives the court jurisdiction of the corporation, regardless of whether the officer served resided in or had an office in such county; though, where the service is made on some inferior clerk or agent, the return must show the facts authorizing such substituted service.—*Weaver v. Southern Oregon Company*, 348.

SERVICE IN TRANSITORY ACTIONS AGAINST NON-RESIDENTS.

2. The expression, "none of the parties," found in the latter part of section 44 of Hill's Code, means none of the defendants; so that in a transitory action a non-resident of this State may be sued in any county that the plaintiff may select, and personal service anywhere within the State will be good.—*Fratt v. Wilson*, 542.

SUPREME COURT.

BILL OF EXCEPTIONS SHOWING PART OF THE EVIDENCE.

1. Alleged error in overruling a motion for a new trial on the ground that the verdict was against law will not be considered by the Supreme Court, where the bill of exceptions does not contain or purport to contain all the evidence given on the trial, or all the instructions of the court.—*First National Bank v. Linn County Bank*, 296.

APPEAL FROM DECREE SUSTAINING DEMURRER.

2. Where a decree sustaining a demurrer to a complaint on the

SUPREME COURT—CONTINUED.

ground that it does not state a cause of suit is affirmed, final judgment will not be entered, but the cause will be remanded for such further proceedings as may be deemed proper.—*Fowle v. House*, 305.

DEFAULT AS A WAIVER OF DEFECTS IN PLEADINGS.

3. The question of the sufficiency of a complaint cannot be raised on appeal from a judgment given for want of an answer.—*Weaver v. Southern Oregon Company*, 348.

STIPULATION WILL NOT CONFER JURISDICTION.

4. An appeal to the Supreme Court from Crook County having been perfected in September, 1892, the cause would properly have been triable at Salem in October following, under Hill's Code, § 2327, subd. 3, as that was the next session of the court. The parties, however, stipulated to try the case at Pendleton, where the next term was in May, 1893; but, before the session began, made another agreement to hear the case at Salem, and the transcript was filed there after the October term of 1892 had expired. On a motion to dismiss for want of jurisdiction, *held*, (1) that the court at Salem never acquired jurisdiction, as the transcript was not filed there at the next ensuing term after the appeal was perfected, viz., the October term of 1892; (2) that the court at Pendleton never acquired jurisdiction, as the transcript was not filed there at the first term after the appeal had been perfected, viz., the May term, 1893; and (3) that the parties could not by agreement confer jurisdiction on either court, the transcript not having been filed at either place within the statutory time.—*Connor v. Clark*, 382.

CONCLUSIVENESS OF FINDINGS ON APPEAL.

5. A finding of fact by a trial court in a law action will not be disturbed on appeal if there is any evidence to support it.—*Liebe v. Nicolai*, 364.

POWER OF THE SUPREME COURT TO MODIFY JUDGMENTS AT LAW.

6. The Supreme Court may differ from a trial court on the conclusions of law to be deduced from a given state of facts, in a law action, and thereupon remand the case with instructions to modify the judgment, but it cannot review questions of fact in such cases, except to ascertain whether the findings are supported by any evidence.—*Liebe v. Nicolai*, 365.

ABSTRACT AS A BASIS OF JURISDICTION.

7. Where the parties stipulate that a printed abstract shall be filed in lieu of the usual transcript on appeal (rules 4 and 13, Rules of Supreme Court, 24 Or., pp. 595, 601), one of them cannot afterwards object that the court has no jurisdiction, under section 541, Hill's Code, providing that the jurisdiction of the appellate court shall attach only on filing the transcript.—*Fratt v. Wilson*, 542.

REHEARING—APPLICATION TO OPEN DECREE.

8. A motion will not lie in the Supreme Court for a rehearing and for an order opening a decree that has been affirmed on appeal in order that newly discovered evidence may be considered; the remedy being by an original suit to vacate the decree under section 381 of the Code.—*Nessley v. Ladd*, 564.

SUPREME COURT—CONCLUDED.

ERRORS NOT SPECIFIED IN NOTICE.

9. The Supreme Court will not consider whether the damages awarded were excessive unless the notice of appeal specifies that as one of the errors.—*Osmun v. Winters*, 178.

PRESUMPTION FROM FAILURE TO APPEAL.

10. One who does not appeal from a final order is presumed to be satisfied with the result, and no complaint from him will be heard by the appellate court.—*Cooper v. Thomason*, 162.

ABATEMENT OF APPEAL BY DEATH OF DEFENDANT.

11. An appeal from a conviction of a crime abates on the death of a defendant, and it cannot be prosecuted to a final determination by the personal representatives of the accused, even though the abatement leaves in force a judgment for costs that is enforceable against the estate of the deceased.—*State v. Martin*, 108.

SURETIES.

Liability for Defalcation of Official Holding Over. See OFFICIAL BONDS, 1, 2.

When sureties on Appeal From Justice's Court Must Justify Before Justice. See APPEAL, 17.

SURVIVORSHIP.

A conclusion of law that the share of one of several joint heirs capable of making a will descended on his death to the survivors, is not supported, in the absence of a finding that he died intestate, or that he did not leave a widow, child, or parent surviving.—*Grazt v. Paddock*, 312.

TAXES AND TAXATION.

SUFFICIENCY OF DESCRIPTION IN TAX DEED.

1. The correct interpretation of section 2773, Hill's Code, is that if land is so situated that it cannot be definitely described by legal subdivisions, or by lots and blocks, it must be described in some other manner that will make its location certain. Measured by this rule, a description in an assessment roll and in a tax deed as a "fraction of lot 2 in block 49," for example, is so indefinite that it entirely fails to identify any parcel of land whatever, and is absolutely meaningless.—*Jory v. Palace Dry Goods Company*, 196.

RECOVERY OF AMOUNT PAID BY PURCHASER AT TAX SALE.

2. The provision of our code (section 2821) that when the holder of a tax title sues for the land described in his tax deed, the owner must deposit in court the amount paid for the tax deed, with interest, etc., as a condition precedent to filing his answer, is supported on the theory that the tax purchaser has acquired the lien of the county for the tax, and that, the purchaser having paid to the county by his purchase a just obligation of the citizen's, the latter ought to repay him before getting the lien released; but where the tax itself is void, or where the assessment is so irregular that it is impossible to say what property is intended to be affected by it, no lien is created.

TAXES AND TAXATION—CONTINUED.

and consequently the tax purchaser can acquire none. In such cases the owner need not make any tender with his answer.—*Jory v. Palace Dry Goods Company*, 196.

SPECIAL LAW—CONSTITUTION, ARTICLE IV, § 23.

3. A provision in a special law giving a common council of a city the exclusive control of all funds collected under general laws for the improvement of roads and streets within such corporation is not in conflict with the State constitution, article IV, § 23, subds. 7 and 10, prohibiting special or local laws "for laying, opening, and working on highways and for the election or appointment of supervisors," and "for the assessment and collection of taxes for * * * road purposes."—*Oregon City v. Moore*, 215.

RIGHT OF CITY TO PART OF COUNTY ROAD TAXES.

4. Under section 4085, subdivision 4, of Hill's Code, as amended (Laws 1893, p. 60), authorizing the county to levy and collect a road tax, and providing that the County Court shall apportion the amount collected among the road districts in the county, having due regard to the amount of taxes collected therein, to the condition of the roads, and the necessity for repairs, and to the amount of travel thereon, a city having the right to control the expenditure of its part of such funds cannot compel the county treasurer to pay the same to it till such apportionment is made.—*Oregon City v. Moore*, 215.

5. The right of a city to a portion of the road tax collected by county officials from its inhabitants cannot be determined by a mandamus proceeding against the county treasurer, where the law under which the tax was collected gives the County Court the power to determine the share belonging to the municipality, the remedy being by appeal from the award.—*Oregon City v. Moore*, 215.

6. Section 6, of the act of February 21, 1893 (Laws 1893, p. 116), refer only to the collection and custody of taxes collected by county officers as agents of the municipality for which they were levied, and do not authorize a city to maintain mandamus against a county treasurer for a share of the road taxes collected under a general law, in the absence of an order from the County Court fixing the city's proportion of the fund, and ordering the county treasurer to pay it over.—*Oregon City v. Moore*, 215.

WRIT OF REVIEW—ORDER LEVYING TAX.

7. An order of the County Court, levying a tax after equalizing and considering the assessment roll, is a final order from which a writ of review may be prosecuted.—*Southern Oregon Company v. Coos County*, 250.

ASSESSOR'S ROLL IS PRIMA FACIE CORRECT.

8. Where a complaint is made by a property owner to the board of equalization that his assessment is excessive, the assessment roll as returned by the assessor fixes the value prima facie against both the board and the complainant; and, though the only testimony offered is by the complainant, the board having disagreed with his estimate of values, there is for review only a disputed question of fact which cannot be tried in such a proceeding.—*Oregon Coal Company v. Coos County*, 308.

TAXES AND TAXATION—CONCLUDED.

LOCAL AND SPECIAL LAWS FOR TAXATION.

9. The act of February 22, 1893 (Laws 1893, p. 163), fixing the compensation of sheriffs, clerks, and recorders, is not unconstitutional as in conflict with the State constitution, article IV, § 23, subd. 10, prohibiting local or special laws for the assessment and collection of taxes—assuming but not deciding that the fees provided by that act are taxes—for the act is applicable to every county in the State; and for the same reason is not in conflict with the State constitution, article IV, § 23, subd. 3, providing that no local law shall be passed regulating the practice in courts of justice.—*Northern Counties Trust v. Sears*, 388.

INJUNCTION BY PRIVATE CITIZEN—ILLEGAL DEBTS.

10. A taxpayer may maintain a suit in his own name to restrain the creation of an illegal debt by a municipal corporation where the effect of such corporate action will be to increase his burden of taxation, but where the funds have already been misapplied and are gone, the proper party to complain is the injured corporation, either in its own name or on the relation of some proper person.—*Brownfield v. Houser*, 534.

11. A private taxpayer may maintain a suit to enjoin the issuance of a warrant for items illegally allowed by the County Court.—*Brownfield v. Houser*, 534.

CONSTITUTIONAL LAW—FEES OF OFFICERS.

12. The act of 1893, as amended (Laws 1895, p. 77), fixing the compensation of sheriffs, clerks, and other county officers, does not violate article IV, section 23, subd. 10, of the State constitution, prohibiting special or local laws for the assessment and collection of road, township or county taxes, even if it be conceded that the fees collected by said officials are taxes.—*Brownfield v. Houser*, 534; *Northern Counties Trust v. Sears*, 388.

TENDER.

WAIVER OF TENDER—SPECIFIC PERFORMANCE.

1. Where the giver of an option on real estate enters and takes possession of the property before the expiration of the time limited in the option, and in violation of its terms, his conduct will not be considered such a repudiation of the option as to excuse a tender under the provisions of the contract, where it is mutually understood that the holders of the option may complete the purchase as stipulated; such conduct by the maker of the contract may excuse punctuality of performance, but will not excuse performance entirely.—*Clarno v. Grayson*, 111.

2. The giver of an option to purchase real estate took possession of the premises in violation of the option he had given, and during his holding derived a profit from it. The holder of the option sued for specific performance, but made no tender of the purchase price, claiming that the defendant had made more profit during his wrongful possession than the amount due on the bond. *Held*, that in the absence of an accounting, or a refusal to account, the purchase price must be tendered as a condition precedent.—*Clarno v. Grayson*, 112.

TENDER—CONCLUDED.**PLEADING WILLINGNESS TO PERFORM.**

3. In a suit to enforce the terms of a contract, an allegation that plaintiff stands "ready, willing, and waiting to perform" is insufficient; the tender should be to do all the things and comply with all the conditions necessary to complete the acquisition of the rights claimed.—*Clarno v. Grayson*, 112.

TENDER TO AVOID COSTS.

4. A defendant desiring to avoid the payment of costs by virtue of a tender under section 561 of Hill's Code, must allege that before the commencement of the action he tendered to plaintiff an amount in satisfaction of his demand, and now brings the same into court and deposits it for plaintiff.—*Jacobs v. Oren*, 593.

5. Where defendant alleged a tender and deposit in court of that part of the amount admitted to be due, a verdict in favor of plaintiff for that sum does not of itself show that the allegations of tender and deposit were found to be true, so as to entitle defendant to recover his costs, without a special finding to that effect.—*Jacobs v. Oren*, 593.

TENURE OF OFFICE of Public Official. See **CONST. LAW**, 10.

TIE VOTE in Municipal Elections. Same as **ELECTIONS**.

TIME.

For Stating Ground of Objection to Testimony. See **TRIAL**, 14.

For Filing Transcript From Justice's Court. See **APPEAL**, 14.

As a Necessary Element in Contracts. See **CONTRACTS**, 5.

How Computed. See **STATUTE OF LIMITATIONS**, 1.

TITLE OF AMENDATORY ACT. Same as **CONST. LAW**, 5.

TITLE BY RELATION.

The appropriation of the water of a stream running through the public domain, initiated by the posting and recording of a notice in accordance with a custom, and perfected by a diversion and application of the water to beneficial uses within a reasonable time, dates back, under the doctrine of relation, to the first step taken.—*Nevada Ditch Company v. Bennett*, 60.

TRANSCRIPT.

Abstract of Record in Lieu of Transcript. See **APPEAL**, 13.

Time for Filing Transcript in Circuit Court. See **APPEAL**, 14.

TRANSITORY ACTIONS.**SERVICE OF PROCESS AGAINST NON-RESIDENTS.**

1. The expression, "none of the parties," found in the latter part of section 44 of Hill's Code, means none of the defendants; so that in a transitory action a non-resident of this State may be sued in any county that the plaintiff may select, and personal service anywhere within the State will be good.—*Fratt v. Wilson*, 542.

TRANSITORY ACTIONS—CONCLUDED.

2. The expression, "none of the parties reside in this State," found in section 44 of Hill's Code, refers to all non-resident defendants, whether they are found in the State or are absent therefrom.—*Fratt v. Wilson*, 542.

TRIAL.

SHOWING PREJUDICE OF WITNESS BY CROSS EXAMINATION.

1. A jury is entitled to know the bias of a witness and the extent to which his feelings are enlisted in a cause, so that they may fairly determine the weight to be given to his testimony, and for the purpose of ascertaining his opinion it is proper to ask on cross examination if he had not expressed a certain feeling or used a given expression concerning the case.—*State v. Ellsworth*, 145.

FOUNDATION FOR SHOWING HOSTILITY OF WITNESS.

2. The rule for laying the foundation is the same where it is intended to show the hostility of a witness as where it is intended to impeach him. Thus, as a foundation for showing hostility of a witness to defendant, E., it is enough to ask if, in referring to failure of the jury to agree on a verdict at a former trial, the witness did not, at a certain time and place, ask his friend, a man about 60 or 65 years old, with a gray moustache, whose name was unknown to counsel, what he thought of the jury in the E. case, and, on his answering that he understood that they disagreed, say to him, "Well, that was better than an acquittal." This was sufficiently definite as to time, place, and persons present to refresh the witness' memory.—*State v. Ellsworth*, 145.

CROSS EXAMINATION TO TEST WITNESS.

3. A witness who has testified on direct examination that the scow, the condition of which at the time it sank is in issue, was built by a certain person and was in good condition at the time it was delivered to defendant, may be asked on cross examination if he knew the builder before he built the scow, and whether he ever knew or heard of the scow being sunk before it was finally sunk in defendant's service, in view of section 837, Hill's Code, permitting an adverse party to cross examine a witness as to any matter stated in his direct examination, or connected therewith.—*Oregon Pottery Company v. Kern*, 328.

4. In an action for damages for the loss of a scow, where a witness has testified that he calked the scow just before its delivery to defendant, and that it was then in good condition and worth a certain sum, defendant may, on cross examination, ask: "Did you ever know anything about that scow before you were called to repair it? Did you ever examine it?" for the purpose of showing the means of knowledge and extent of information of the witness on the question of value.—*Oregon Pottery Company v. Kern*, 328.

DISCRETION AS TO CROSS EXAMINATION.

5. Where the cross examination of a party goes to matters outside his examination in chief, but which are pertinent to his adversary's cause, and might have been introduced by him in the first instance, such examination becomes subject to the rules that would govern a direct examination on his own account (Code, § 837), and it is dis-

TRIAL—CONTINUED.

cretionary with the court whether the testimony shall be introduced then and in that manner.—*Osmun v. Winters*, 178.

INVADING PROVINCE OF JURY—EXPRESSION OF OPINION.

6. An instruction that the jury have no right to reject the testimony of the wife and daughter of the accused simply because it came from a source in which there would be strong motives to give the "most favorable coloring possible" to the facts on behalf of the accused, is prejudicial error as an expression of opinion on the motives of the witnesses.—*State v. Pomeroy*, 17.

ATTORNEY'S FEES IN NOTE—PROVINCE OF JURY.

7. In an action on a note providing for reasonable attorney's fees, in which defendant raises an issue as to the reasonableness of the amount claimed, not only must there be testimony to determine the question, but such testimony must be presented to the jury, and it is their right to determine that as they do other disputed questions of fact, so that the court cannot include in a judgment an allowance for attorney's fees, where the jury did not fix the amount by their verdict. A court cannot thus render a special verdict on one of the disputed issues, while the jury determines the other issues.—*Cox v. Alexander*, 438.

RIGHT OF COURT TO REFER CAUSE—EXAMINATION OF ACCOUNTS.

8. The Circuit Court of Multnomah County, if a case before it involves the examination of long and complicated accounts, may, without the consent of the parties, refer it to a referee; and, where one branch of a case requires twenty-six pages of account for its statement, the reference is justified.—*Craig v. California Vineyard Company*, 43.

EFFECT OF SETTING ASIDE REPORT OF REFEREE.

9. A trial court, in an action at law, has the same control over a report of a referee that it has over the verdict of a jury, and its power to set aside such report extends to all the causes prescribed by statute for setting aside the verdict of a jury; and, where a trial court sets aside the report of a referee, in an action at law, and makes new findings, under section 229 of Hill's Code, providing that in such case the court may make another reference, or "may find the facts and determine the law itself," its findings of fact, though based on the evidence reported by the referee, are entitled to every presumption in their favor that would arise if made on an original trial by the court; and will not be reviewed on appeal when supported by any evidence.—*Liebe v. Nicolai*, 365.

DISCRETION AS TO CHANGE OF VENUE.

10. Under section 1222, Hill's Code, authorizing the court to order the place of trial changed when it appears by affidavit that a fair and impartial trial cannot be had, the granting of such order rests in the sound discretion of the trial court, and in this case it does not appear that this discretion was abused to any substantial injury of the accused.—*State v. Pomeroy*, 16.

DIRECTING VERDICT.

11. Where there is any evidence that fairly tends to show guilt it is the duty of the court to submit to the jury the question of

TRIAL—CONTINUED.

defendant's guilt or innocence, and in this instance the testimony justified a submission to the jury.—*State v. Pomeroy*, 16.

BREACH OF PROMISE—FALSE CHARGES.

12. On a trial for breach of a marriage promise, where no proof of defendant's allegations against the character of plaintiff has been offered, it is not error to charge that, where defendant fails to prove such allegations, "it is a worse case than if there had been a simple denial of the contract of marriage, and the action had proceeded on the simple allegations and denials."—*Osmun v. Winters*, 178.

WAIVER OF OBJECTION TO MISCONDUCT OF JUROR.

13. A party who by himself or his attorney is aware of the misconduct of a juror during the trial, and while the cause is yet in the hands of the jury, but does not bring it to the knowledge of the court and ask to have the jury discharged or recast, cannot make it a ground of a motion for a new trial.—*Osmun v. Winters*, 178.

WAIVER OF OBJECTION TO TESTIMONY.

14. An objection must be taken and the ground thereof stated when the testimony is offered or the point will be considered waived.—*Spreckels v. Bender*, 577.

WAIVER OF MOTION BY DEMURRING.

15. A motion to strike out parts of an answer is waived by the subsequent filing and hearing of a demurrer thereto.—*Holman v. DeLin*, 428.

MOTION TO STRIKE OUT TESTIMONY.

16. A motion to strike out must be directed entirely to incompetent matter, for if any of the matter to which it refers is competent, the request must be refused.—*Jennings v. Garner*, 344.

AMENDMENT OF PLEADINGS DURING TRIAL—DISCRETION.

17. Where a motion for leave to file an amended answer is called up the day before the time set for a second trial of the case, and the proposed amendment tenders a new issue, it is within the discretion of the court whether or not to allow the motion, and no abuse of such discretion seems to have occurred in this case.—*Osmun v. Winters*, 177.

18. In an action against an officer to recover damages for selling the property of plaintiff on an execution against another, where the answer merely denies plaintiff's ownership, it is within the discretion of the trial court, and is not a substantial change in the defense, under section 101 of Hill's Code, to permit defendant to amend during the trial by adding an allegation that plaintiff fraudulently took and held the property in question.—*Davis v. Hannon*, 192.

AMENDMENT OF RETURN.

19. The practice in allowing amendments to returns on writs should be liberally exercised in furtherance of justice. It is a matter, however, that rests in the discretion of the trial court, reviewable only for abuse.—*Weaver v. Southern Oregon Company*, 348.

DISCRETION IN SETTLING BILLS OF EXCEPTIONS.

20. A trial judge has a wide discretion in the matter of presenting

TRIAL—CONCLUDED.

and settling bills of exceptions, and the appellate court will not attempt to control his action by mandamus except under unusual circumstances. The practice in such matters should be liberal, however.—*McElvain v. Bradshaw*, 569.

21. Mandamus will not lie to compel a circuit judge to allow a bill of exceptions after failure of the appellant to present the same within the time allowed therefor, where the excuse for the delay is inability to obtain a copy of the official report from the stenographer, and a mistaken belief as to the time allowed for presenting the bill.—*McElvain v. Bradshaw*, 569.

TRUST FUNDS.

Effect of Purchasing With Trust Money. See TRUSTS, 3, 4.

Tracing Trust Funds Into Trust Property. See TRUSTS, 6.

TRUST PROPERTY.

Tracing Trust Funds Into Trust Property. See TRUSTS, 6.

TRUSTS AND TRUSTEES.

PAROL TRUST—STATUTE OF FRAUDS.

1. Though a trust in real estate cannot be created by parol, the same rule does not apply to personal property; and if a grantee sells land under a parol agreement to convert it into money and pay the grantor's debts, his subsequent acknowledgment of the trust will bind him.—*Cooper v. Thomason*, 161.

PAROL EVIDENCE—EXPRESS TRUST.

2. In a suit to enforce a trust in personal property which is the proceeds of land held in trust, parol evidence is admissible to prove the original agreement under which the premises were held, as a consideration for a subsequent declaration of the trust by the trustee.—*Cooper v. Thomason*, 162.

DISTINCTION BETWEEN RESULTING AND CONSTRUCTIVE TRUSTS.

3. A resulting trust is one where property is purchased with the money of another, though the title is not taken in such other's name; while a constructive trust ensues where the purchase is made and the title acquired secretly, and in violation of some duty to the cestui que trust; and in both cases the evidence that the money was furnished by and was expended for the alleged beneficiary must be clear and convincing.—*Barger v. Barger*, 268.

PARTIAL RESULTING TRUST.

4. Where a trust is claimed to the extent of a part only, it must be decisively shown just what proportion of the price was paid by the alleged beneficiary, and that the payment was for some specified interest in the estate.—*Barger v. Barger*, 268.

TIME WHEN TRUST ARISES.

5. A trust must always originate at the time the title is acquired, and the price for the interest claimed must then be paid or secured.—*Barger v. Barger*, 268.

TRUSTS AND TRUSTEES—CONTINUED.

TRACING TRUST FUNDS INTO TRUST PROPERTY.

6. So long as trust property can be traced and distinguished, although in changed form, it may be reclaimed; but when the identity of the original property is lost the trust escapes; from which it follows that either the entire ownership of the changed form of property must be established, or the ownership of some aliquot part of such property, to sustain a trust therein.—*Barger v. Barger*, 268.

IMPLIED TRUST—PURCHASE WITH WIFE'S MONEY.

7. Where a husband, without objection, uses his wife's money jointly with his own in a series of business ventures, no trust in favor of the wife can attach to a tract of land bought partly with the proceeds of the business and partly with borrowed money.—*Barger v. Barger*, 268.

EXPENDITURES BY TRUSTEE.

8. One holding the legal title to land, partly, however, in trust, cannot charge the cestui que trust with money expended without his consent or knowledge for subsidies to such enterprises as water works or street-car lines.—*Royal v. Royal*, 448.

COMPENSATION OF TRUSTEE.

9. A trustee of lands who receives the income therefrom without rendering any account thereof, or being called upon for an account, is not entitled to any compensation for services as trustee.—*Royal v. Royal*, 448.

COSTS—TRUSTEES.

10. Where litigation has been caused by the wrongful conduct of a trustee or one of the parties to a contract, the costs and disbursements ought to be charged against the party at fault.—*Royal v. Royal*, 448.

PUBLIC CHARITY.

11. A gift for the maintenance of free public schools is clearly a gift to a legal charity, and the object and the beneficiaries are as certain as the rules governing charitable trusts require.—*In re John's Will*, 494.

CHARITABLE TRUST FOR PUBLIC SCHOOLS.

12. The fact that by law provision has been made for the maintenance of public schools in all school districts, without making it, however, compulsory on the district to maintain such schools, does not render invalid a bequest in trust for the maintenance of a public school.—*In re John's Will*, 494.

EQUITY JURISDICTION OVER TRUSTS.

13. Courts of equity in this country, except when prohibited by statute, exercise original inherent jurisdiction over charitable trusts.—*In re John's Will*, 495.

RULE AGAINST PERPETUITIES.

14. A charitable trust is not invalid, as against the rule of perpetuities, because the will provides for the appointment of trustees fifteen years after testator's death, the property in the meantime being given in trust to the executors, for the gift was absolutely and at once

TRUSTS AND TRUSTEES—CONCLUDED.

to charity, and falls under the exception to the rule.—*In re John's Will*, 495.

GIFTS TO CHARITY—SUCCESSION OF TRUSTEES.

15. A charitable trust will not be permitted to fail because the trust may outlive the trustees who are appointed to administer it; for charity is ever a favorite of equity, and a valid trust of that kind will not be suffered to lapse for mere want of a trustee. So, if a donation to charity is immediate and absolute, and a competent trustee is appointed to take, the other conditions being sufficient, a trust arises at once, the property becomes impressed with it, and immediately passes beyond the reach of the heirs or residuary legatees.—*In re John's Will*, 495.

UNCERTAINTY OF TRUSTEES.

16. A charitable trust is not invalid on account of the uncertainty of the trustees, because fifteen years after testator's death, the property in the meantime being given in trust to the executors, the trustees are to be appointed, one each by the incumbent judges of the State Circuit Court and of the Federal District Court, and a third by the two so appointed, and vacancies to be filled by persons appointed by the incumbents of such judgeships.—*In re John's Will*, 495.

JURISDICTION OF EQUITY TO APPOINT TRUSTEES.

17. A failure to act on the part of persons authorized to appoint the trustees of a charitable gift will not result in a failure of the trust, for equity will appoint and see that the wishes of the donor are carried out.—*In re John's Will*, 495.

GIFT TO CHARITY A CHARGE ON LANDS DEVISED.

18. The fact that no provision was made in a will for the conveyance to the trustees of certain land therein given the executors in trust will not defeat the trust, as such land would be charged with the trust in either the hands of the executors or heirs.—*In re John's Will*, 495.

UNDERTAKING

For Costs on Appeal Construed. See COSTS, 2.

UNILATERAL CONTRACT.

Part Performance as a Consideration. See CONTRACTS, 1.

USURY.

ADVERSE PARTY TO APPEAL—SERVICE OF NOTICE.

1. The word "party," as used in section 537 of Hill's Code, providing that a notice of appeal must be served on every "adverse party," means only one who becomes identified with the case in some mode recognized by law, so as to be bound by the proceeding. Within the scope of this rule, the fact that a contract has been adjudged usurious, and the principal declared forfeited to the State for the use of the school fund, does not make the State a "party" to the proceeding so as to require notice of appeal to be served on it.—*Barger v. Taylor*, 228.

ADVERSE PARTY TO AN APPEAL.

2. The State is not an "adverse party" in the sense that it must be

USURY—CONCLUDED.

served with a notice of appeal from a judgment or decree in its favor upon consideration of a contract found to be usurious. It is not obliged to intervene in order to obtain the benefit of the forfeiture provided by section 3589, in cases of usury, and unless it has been made a party to the proceeding in some appropriate manner, it is not a "party" to the litigation at all.—*Barger v. Taylor*, 228.

STRONG TESTIMONY TO ESTABLISH USURY.

3. Forfeitures, though not favored, are firmly upheld as a penalty to the State for a violation of law, but proof of the transaction incurring such punishment must not be left to probability or conjecture.—*Barger v. Taylor*, 228.

PRESUMPTION AS TO SCOPE OF AGENCY.

4. The presumption is that an agency comprehends the doing of only lawful things, and the law will always assume that an illegal act, as, for example, accepting usury, was done without the principal's authority or consent.—*Barger v. Taylor*, 228.

PROOF NECESSARY TO ESTABLISH USURY.

5. In order to establish usury it must be shown that the borrower paid for the loan, either directly or indirectly, a sum more than the amount of interest at the lawful rate, and that the lender either received some part of this excess, or authorized or ratified its exaction.—*Barger v. Taylor*, 228.

VENDOR AND PURCHASER.

RIGHT TO REPLEVIN FOR FRAUD OF VENDER.

1. Where an insolvent orders large quantities of goods in anticipation of failure, for the purpose of surrendering them to a preferred creditor, and such goods are thereafter fraudulently attached by such creditor, the vendors of the property thus obtained may rescind the sales, and bring replevin to recover possession of their respective goods.—*Craig v. California Vineyard Company*, 43.

TIME AS ESSENCE OF CONTRACT.

2. When time should be considered an important element in contracts is discussed at considerable length but not decided.—*Clarno v. Grayson*, III.

SPECIFIC PERFORMANCE OF OPTION.

3. An owner of land who would insist upon strict performance by a prospective purchaser as a condition precedent to an action by the latter for the specific performance of an option to purchase must not himself be the cause of the breach.—*Clarno v. Grayson*, III.

ABANDONMENT OF OPTION.

4. The mere executing of a general assignment for creditors by the holder of an option to purchase real estate will not be considered as an abandonment of the right to complete the transaction, where the assignment was resorted to for the purpose of dissolving attachments that were impeding the completion of the purchase, and the individual stockholders were ready to support the assignee in carrying out the terms.—*Clarno v. Grayson*, III.

VENDOR AND PURCHASER—CONCLUDED.

POSSESSION AS NOTICE.

5. Possession of land by a third person is constructive notice of such person's legal and equitable rights.—*Cooper v. Thomason*, 162.

SPECIFIC PERFORMANCE—POSSESSION BY VENDEE.

6. The vendor in a parol contract for the sale of lands may enforce specific performance thereof, where he has delivered possession to the purchaser, who has held such possession and made improvements entitling him to the enforcement of the contract as against the vendor.—*Cooper v. Thomason*, 162.

FORFEITING BOND FOR DEED.

7. A vendor in an action at law in Oregon has the right, as between itself and the defaulting purchaser, to declare at an end a contract for the sale of real estate and to enforce the provisions as to forfeiture agreed upon.—*Holbrook v. Investment Company*, 259.

VENUE.

Discretion of Court as to Changing. See CHANGE OF VENUE.

VERDICT.

DIRECTING VERDICT FOR LACK OF EVIDENCE.

1. Where there is any evidence that fairly tends to show guilt it is the duty of the court to submit to the jury the question of defendant's guilt or innocence, and in this instance the testimony justified a submission to the jury.—*State v. Pomeroy*, 16.

BROKER'S COMMISSIONS—SUFFICIENCY OF COMPLAINT.

2. To entitle a real estate broker to commissions it must be shown that the broker produced to the seller some one who bought the property, or a purchaser who was ready, able, and willing to buy on the terms proposed, and that such purchaser was rejected; and a failure to plead such facts leaves the complaint so defective that a verdict will not cure it, for the complaint will not then contain allegations under which these matters can be proved.—*Booth v. Moody*, 222.

VERDICT CONTRARY TO THE PLEADINGS.

3. Where defendant admitted that he owed part of the sum demanded, the judge very properly set aside a verdict in his favor, and granted a new trial.—*Jacobs v. Oren*, 593.

VESTED RIGHT to Pilot's Certificate. See PILOTS AND PILOTAGE.

VOTES AND ELECTIONS.

Determining Tie Vote in Municipal Elections. See ELECTIONS.

WAIVER.

SPECIFIC PERFORMANCE—WAIVER OF CONDITION PRECEDENT.

1. Acts or declarations on the part of the owner which amount to a rescission or repudiation of an option for the purchase of land, and an absolute and positive denial of any and all duties under it, may render unnecessary strict performance by the purchaser before suit to

WAIVER—CONCLUDED.

secure specific performance, upon the ground that it would be a useless and vain thing to tender the stipulated performance, knowing that it would not be accepted.—*Clarno v. Grayson*, 111.

DEFECT OF PARTIES—DEMURRER.

2. Where an objection for defect of parties is apparent on the face of the pleadings, the objection must be made by demurrer (section 71, Hill's Code), or it will be deemed waived.—*Cooper v. Thomason*, 162.

MISCONDUCT OF JURORS—WAIVER OF OBJECTION.

3. A party who by himself or his attorney is aware of the misconduct of a juror during the trial, and while the cause is yet in the hands of the jury, but does not bring it to the knowledge of the court and ask to have the jury discharged or recast, cannot make it a ground of a motion for a new trial.—*Osmun v. Winters*, 178.

EVIDENCE—WAIVER OF PROOF.

4. A stipulation that a letter favorable to the adverse party may be read to the jury upon the condition that a deposition favorable to the stipulating party, but which was objectionable on account of certain irregularities, should also go in evidence, is not an admission that the letter is genuine, but merely dispenses with proof of its genuineness in the first instance.—*Osmun v. Winters*, 178.

DEFAULT AS A/WAIVER OF DEFECTS IN PLEADINGS.

5. The question of the sufficiency of a complaint cannot be raised on appeal from a judgment given for want of an answer.—*Weaver v. Southern Oregon Company*, 348.

WAIVER OF MOTION BY DEMURRING.

6. A motion to strike out parts of an answer is waived by the subsequent filing and hearing of a demurrer thereto.—*Holman v. DeLin*, 428.

ESTOPPEL MUST BE PLEADED.

7. A party who has an opportunity to plead an estoppel upon which he relies, and fails to do so, but goes to issue on the fact, waives the estoppel, and puts the matter at large, and the jury may disregard the estoppel, and are at liberty to find the truth.—*Nickum v. Burckhardt*, 464.

WAIVER OF OBJECTION TO EVIDENCE.

8. An objection must be taken and the ground thereof stated when the testimony is offered or the point will be considered waived.—*Spreckels v. Bender*, 577.

WAREHOUSES AND WAREHOUSEMEN.

A warehouse, within the meaning of the provisions of sections 4201-4207, Hill's Code, is a place where any of the commodities enumerated in such sections are received on storage for the owner by some one engaged in the general business of receiving such goods in store for profit or compensation; therefore, to sustain a conviction under this "Warehouse Act," as it is called, it must be shown that some of the articles named in the statute were placed on storage in some building that was a "warehouse" under that act.—*State v. Stockman*, 36.

WATERS AND WATER RIGHTS.

REASONABLE DILIGENCE IN APPROPRIATING WATER.

1. In the early summer of 1881, persons claiming an appropriation of water from a public stream posted a notice at the head of the proposed ditch, as required by local custom, stating the amount of water claimed, the purposes for which it was to be applied, and the route and terminals. Work was begun shortly afterwards, and a dam was built and a diversion made for the purpose of aiding in the excavation. The first section, two miles long, was completed in the spring of 1882. During 1882 the ground was cleared for the excavation of the second section to the further terminal. In the spring of 1883 the work was prosecuted till the irrigating season, when it was stopped to permit the use of water through the completed portion. It was resumed in the fall, and continued till the completion of the second section, in the spring of 1884; and during that year water was run through the full length of the two sections—nine miles—and used for irrigation purposes. *Held*, that the claimants, who were pioneers, and of limited means and facilities, exercised due and reasonable diligence in the prosecution of the work.—*Nevada Ditch Company v. Bennett*, 60.

DATE OF APPROPRIATION BY RELATION.

2. The appropriation of the water of a stream running through the public domain, initiated by the posting and recording of a notice in accordance with a custom, and perfected by a diversion and application of the water to beneficial uses within a reasonable time, dates back, under the doctrine of relation, to the first step taken.—*Nevada Ditch Company v. Bennett*, 60.

"APPROPRIATION" OF WATER DEFINED.

3. A claim to the waters of a stream does not become an "appropriation" until there is an actual application of the water claimed to some beneficial purpose. There is no such thing as a constructive appropriation, nor can any step in the course of perfecting the claim be accomplished except by a genuine physical performance of it.—*Nevada Ditch Company v. Bennett*, 60.

LIMIT OF APPROPRIATION.

4. An appropriation of water from a stream is in every instance limited to the quantity needed to accomplish the beneficial purpose for which the diversion was made.—*Nevada Ditch Company v. Bennett*, 60.

REASONABLE DILIGENCE IN APPLYING APPROPRIATION.

5. An appropriator of water from a stream is entitled to a reasonable time after he has diverted and carried the water to the place of use, in which to make the actual application to the contemplated useful purpose.—*Nevada Ditch Company v. Bennett*, 60.

TRANSFER OF INCOMPLETE WATER RIGHT—APPURTENANCE.

6. Where a person who has initiated but not perfected a water appropriation conveys his interest in the land to which the water right is appurtenant, the right so initiated passes with the land, and the successor can complete the appropriation.—*Nevada Ditch Company v. Bennett*, 60.

WATERS AND WATER RIGHTS—CONCLUDED.

TRANSFER OF COMPLETED WATER RIGHT.

7. A sale or transfer of the whole or part of a completed appropriation of water may be made, either in connection with or separate and apart from the land in connection with which the water was originally used; and the purchaser may use it for an entirely different and distinct purpose from the one originally intended.—*Nevada Ditch Company v. Bennett*, 61.

EXTENSION OF BENEFICIAL USE.

8. The bona fide intention to devote the water to a useful purpose, which is required of an appropriator, may comprehend a use to be made by or through other persons, and upon lands and possessions other than those of the appropriator.—*Nevada Ditch Company v. Bennett*, 61.

REASONABLE DILIGENCE IN APPLICATION OF APPROPRIATION.

9. Persons contemplating a use, not only to be applied by themselves, but by such others as might come in, claimed an appropriation of water over public lands. They sought to induce immigration by diverting the water, and carrying it to such localities as would be convenient for use. They completed the ditch with reasonable diligence, and, within a year thereafter, users were ready and willing, with sufficient lands to absorb the appropriation by application to a beneficial use. *Held*, that there was sufficient diligence in the application of the use to prevent the appropriation from lapsing.—*Nevada Ditch Company v. Bennett*, 61.

APPROPRIATION BY GOVERNMENT ON PUBLIC LANDS.

10. Non-navigable streams upon the public domain, not appropriated by the methods cognizant to law, are as much the property of the government as the lands through which they flow, and may be taken and used by the government without any of the steps required of private citizens; but such rights cease whenever the land passes to a private individual or is restored to the public domain, unless there is a special grant continuing the government rights to the grantee.—*Nevada Ditch Company v. Bennett*, 61.

WHEN WATER RIGHT IS NOT APPURTENANT TO PUBLIC LANDS.

11. A public use of water from a public stream by the government does not become appurtenant to the soil, so as to pass with it in a grant to private individuals, so as to give the patentee a right of appropriation superior to that of one who perfected an appropriation before the issuance of the patent, but after the diversion of the water by the government.—*Nevada Ditch Company v. Bennett*, 61.

12. Even if the public use of water, made by the government upon the public domain, would pass as appurtenant to the land under an ordinary patent, so as to render the rights of the patentee superior to those of one who had perfected an appropriation before the issuing of the patent, such rights would not pass under a patent in which the grant is expressly made subject to vested and accrued water rights.—*Nevada Ditch Company v. Bennett*, 61.

WILLS.

PROBATE OF WILL APPOINTING EXECUTOR.

1. A will that appoints an executor is entitled to probate, regardless of whether it purports to dispose of anything or not.—*In re John's Will*, 494.

CONCLUSIVENESS OF ORDER PROBATING WILL.

2. It sometimes happens that in proceedings to probate a will, other issues are tendered and heard besides those ordinarily involved (i. e., testamentary capacity and formality), and when such are heard and determined they will become conclusive between the parties involved.—*In re John's Will*, 494.

JURISDICTION OF COUNTY COURTS TO CONSTRUE WILLS.

3. A court having power to control the conduct of executors, to settle their accounts, to direct the payment of debts and legacies, and to distribute estates, such as is conferred by sections 895 and 1191 of Hill's Code of Oregon, has, by necessary implication, the further power to construe wills so far as they dispose of personalty, and, probably, also as to real property, though this is not so certain.—*In re John's Will*, 494.

PROCEEDINGS TO SECURE CONSTRUCTION OF WILLS.

4. A probate court ought not to entertain a proceeding instituted merely for the purpose of having a judicial construction of a will; the interpretation of such an instrument should be only a step in the attainment of some other object. This rule is analogous to the well-established practice in equity.—*In re John's Will*, 494.

PROBATE OF WILL PARTIALLY VOID.

5. A will, appointing executors and directing the payment of funeral expenses and the expenses of administration, is entitled to probate, though its other provisions creating a charitable trust are invalid.—*In re John's Will*, 494.

PROCEEDING TO REVOKE PROBATE OF WILL.

6. When the probate court has jurisdiction to direct and control the conduct and settle the accounts of executors, such as is conferred by section 895 of Hill's Code, a petition for the revocation of the probate of a will, instituted several years after the original probate, during which time the executor has been antagonistic to the interests of the petitioners, may be considered as a prayer for the direction of the executor in the administration of the personalty.—*In re John's Will*, 494.

RULE AGAINST PERPETUITIES.

7. A charitable trust is not invalid, as against the rule of perpetuities, because the will provides for the appointment of trustees fifteen years after testator's death, the property in the meantime being given in trust to the executors, for the gift was absolutely and at once to charity, and falls under the exception to the rule.—*In re John's Will*, 495.

GIFT TO CHARITY A CHARGE ON LANDS DEVISED.

8. The fact that no provision was made in a will for the conveyance

WILLS—CONCLUDED.

to the trustees of certain land therein given the executors in trust will not defeat the trust, as such land would be charged with the trust in either the hands of the executors or heirs.—*In re John's Will*, 495.

WITNESS.

CROSS EXAMINATION TO SHOW HOSTILITY.

1. A jury is entitled to know the bias of a witness and the extent to which his feelings are enlisted in a cause, so that they may fairly determine the weight to be given to his testimony, and for the purpose of ascertaining his opinion it is proper to ask on cross examination if he had not expressed a certain feeling or used a given expression concerning the case.—*State v. Ellsworth*, 145.

FOUNDATION FOR SHOWING HOSTILITY OF WITNESS.

2. The rule for laying the foundation is the same where it is intended to show the hostility of a witness as where it is intended to impeach him. Thus, as a foundation for showing hostility of a witness to defendant, E., it is enough to ask if, in referring to failure of the jury to agree on a verdict at a former trial, the witness did not, at a certain time and place, ask his friend, a man about 60 or 65 years old, with a gray moustache, whose name was unknown to counsel, what he thought of the jury in the E. case, and, on his answering that he understood that they disagreed, say to him, "Well, that was better than an acquittal." This was sufficiently definite as to time, place, and persons present to refresh the witness' memory.—*State v. Ellsworth*, 145.

SHOWING KNOWLEDGE BY CROSS EXAMINATION.

3. A witness who has testified on direct examination that the scow, the condition of which at the time it sank is in issue, was built by a certain person and was in good condition at the time it was delivered to defendant, may be asked on cross examination if he knew the builder before he built the scow, and whether he ever knew or heard of the scow being sunk before it was finally sunk in defendant's service, in view of section 837, Hill's Code, permitting an adverse party to cross examine a witness as to any matter stated in his direct examination, or connected therewith.—*Oregon Pottery Company v. Kern*, 328.

4. In an action for damages for the loss of a scow, where a witness has testified that he calked the scow just before its delivery to defendant, and that it was then in good condition and worth a certain sum, defendant may, on cross examination, ask: "Did you ever know anything about that scow before you were called to repair it? Did you ever examine it?" for the purpose of showing the means of knowledge and extent of information of the witness on the question of value.—*Oregon Pottery Company v. Kern*, 328.

WORDS AND PHRASES.

"ADDITIONS" to Leased Building.

This word, as used in reference to leased buildings, means additions made to old structures, and does not refer to trade fixtures or chattels brought by tenants onto or into the leased premises.—*Liebe v. Nicolai*, 364.

WORDS AND PHRASES—CONTINUED.

"ADVERSE PARTY" to an Appeal.

The State is not an "adverse party" in the sense that it must be served with a notice of appeal from a judgment or decree in its favor upon consideration of a contract found to be usurious. It is not obliged to intervene in order to obtain the benefit of the forfeiture provided by section 3589, in cases of usury, and unless it has been made a party to the proceeding in some appropriate manner, it is not a "party" to the litigation at all.—*Barger v. Taylor*, 228.

In a suit against a county and its treasurer and sheriff to restrain the levy of a tax to meet the payment of certain county warrants which are claimed to have been illegally issued, the county is an adverse party so as to require it to be served with the notice of appeal by the other defendants from a decree granting the injunction, for if the decree be modified or reversed, its liability to pay will certainly be affected.—*Stuller v. Baker County*, 294.

"APPROPRIATION" of Water.

The word "appropriation" as applied to water rights, means the actual application to a beneficial use of water taken from a public stream.—*Nevada Ditch Company v. Bennett*, 60.

"CONSTRUCTIVE TRUST" Defined.

A constructive trust is the condition of title ensuing where a purchase is made and the title acquired secretly and in violation of some duty to the person whose money is used.—*Barger v. Barger*, 268.

"ERECTIONS" on Leased Premises.

Dynamos and other electrical machinery placed in a leased building for the purpose of furnishing power for an electric light system are not "erections or additions" to the leased premises, within the terms of a lease requiring erections and additions thereon to be surrendered with the premises to the landlord on the termination of the lease; that expression is limited to new buildings erected.—*Liebe v. Nicolai*, 364.

"EXPENSE ACCOUNTS" of Sheriffs.

When a claim for expenses is made by a sheriff, under section 6 of the act of 1895, for traveling without his county to receive a prisoner already in custody, it must be in the form of a detailed account, accompanied by the proper proofs, so that the auditing officer can determine whether each item was an actual expense necessarily incurred.—*Brownfield v. Houser*, 534.

"FUTURE ERECTIONS AND ADDITIONS." See "ERECTIONS."

"NONE OF THE PARTIES." See "PARTIES."

"PARTIES" as Used in Section 44 of the Code.

The expression "none of the parties," found in the latter part of section 44 of Hill's Code, means none of the defendants, and refers to all non-resident defendants, whether they are found in this State or not.—*Fratt v. Wilson*, 542.

"REPAIRS" to Building.

Where a building has been, by the owner or his agent, accepted as completed in accordance with the requirements of the building

THE COURT OF THE COUNTY OF COOS, OREGON, in and for the County of Coos, Oregon, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears from the records of the Court.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the Court at Coos Bay, Oregon, this 1st day of May, 1910.

JOHN W. HILL, Judge of the County of Coos, Oregon.

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WRIT OF REVIEW—CONCLUDED.

petition must contain such a statement of the errors alleged to have been committed as will inform interested persons of the questions intended to be raised.—*Southern Oregon Company v. Coos County*, 250.

QUESTIONS CONSIDERED ON WRIT OF REVIEW.

6. On a writ of review the reviewing court will not, for the purpose of deciding a disputed question of fact, consider the evidence upon which the inferior tribunal acted, but will review the decision of such court or tribunal only upon the ultimate facts appearing by the record.—*Oregon Coal Company v. Coos County*, 308.

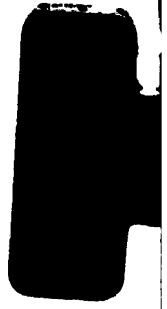
REVIEW OF ACTION OF BOARD OF EQUALIZATION.

7. Where a complaint is made by a property owner to the board of equalization that his assessment is excessive, the assessment roll as returned by the assessor fixes the value prima facie against both the board and the complainant; and, though the only testimony offered is by the complainant, the board having disagreed with his estimate of values, there is for review only a disputed question of fact, which cannot be tried in such a proceeding.—*Oregon Coal Company v. Coos County*, 308.

See also BILL OF REVIEW.

Ex 63

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HARVARD LAW

